TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 494.

THE UNITED STATES, APPELLANT,

vs.

ERIE RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 22, 1914.

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1 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, petitioner, *against* ERIE RAILROAD COMPANY, respondent.	In Equity. Action No. 2. E 11-66.

Hon. ALEXANDER GILCHRIST, Jr.,
Clerk United States District Court,
Southern District of New York:

You will please take notice that the portions of the record to be incorporated into the transcript on the appeal of the petitioner herein, represented by the undersigned solicitor, are as follows:

A. Subpœna.
1. Petition of the United States.
2. Answer of the respondent.
3. Petitioner's notice of motion for judgment and the relief prayed for in the petitioner's bill upon the bill and answer filed herein.
4. Stipulation as to the facts set forth in the petition and answer, and made upon the record of the court at the trial of the above-mentioned cause.
5. Opinion and decision of the District Court written by Hough, D. J.
6. The decree.
7. Petition for allowance of appeal.
8. Assignments of error.
9. Allowance of appeal.
10. Citation on appeal.

New York, April 29, 1914.

H. SNOWDEN MARSHALL,
Solicitor for the Petitioner.
United States Attorney for the Southern District of New York.
Office and post-office address, Room 50, U. S. Court & P. O. Bldg., Borough of Manhattan, city of New York.

2 It is hereby stipulated that the foregoing papers shall constitute the record on appeal herein.

H. SNOWDEN MARSHALL,
U. S. Attorney, Solicitor for Petitioner.
GEO. F. BROWNELL,
M. B. PIERCE,
Solicitors for Respondent.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, Apr. 29, 1914. Geo. F. Brownell, M. B. Pierce, attorneys for respondent. U. S. District Court, S. D. of N. Y. Filed May 1, 1914.)

3 *The President of the United States of America, to Erie Railroad Company, greeting:*

(Seal.)

You are hereby commanded to appear before the judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said court in a suit in equity, by United States of America, Action No. 2, and to further do and receive what the said court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Charles M. Hough, judge of the District Court of the United States for the Southern District of New York, at the city of New York, on the 23rd day of January, in the year one thousand nine hundred and fourteen and of the Independence of the United States of America the one hundred and thirty-eighth.

ALEX. GILCHRIST, Jr., *Clerk.*

H. SNOWDEN MARSHALL,
United States Attorney, Sol'r. for Petitioner.

The defendant is required to file its answer or other defense in the above cause in the clerk's office of this court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

ALEX. GILCHRIST, Jr., *Clerk.*

4 (Endorsed:) I hereby certify, that on the 23rd day of January, 1914, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, Erie Railroad Company, by exhibiting to Geo. F. Brownell, vice pres. and general solicitor of said Co., at 50 Church St., N. Y. City, as per admission endorsed on the within original, and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of bill in equity in this suit.

WILLIAM HENKEL,
United States Marshal, Southern District of New York.

Dated January 24, 1914.

Service accepted Jan. 23, 1914, of the within subpœna and petition.

GEO. F. BROWNELL,
Vice Prest. and General Solicitor, Erie Railroad Co.

U. S. District Court, S. D. of N. Y. Filed Jan. 26, 1914.

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER,
vs.
ERIE RAILROAD COMPANY, RESPONDENT.
} In Equity. No. 2.

To the honorable, the judges of the United States District Court for the Southern District of New York:

H. Snowden Marshall, United States attorney for the Southern District of New York, who petitions herein on behalf of the United States of America, doth, upon information and belief, complain and say:

First. That this proceeding is in pursuance of section 3 of the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February 19, 1903, and is instituted by the said United States attorney for the Southern District of New York, on behalf of the United States of America, at the direction of the Attorney General of the United States.

Second. That said Erie Railroad Company is a corporation organized and existing under the laws of the State of New York; and that upon January 1, 1912, it was, and ever since has been, and
6 now is, a common carrier engaged in the transportation of passengers and property for hire, wholly by railroad, from one State of the United States to other States of the United States, operating lines of railroad extending from the city of New York, in the State of New York, to Jersey City, in the State of New Jersey; from Jersey City aforesaid to Suffern, in the State of New York, and from Suffern to Salamanca, in the said State of New York, and from Salamanca, aforesaid, to Marion, in the State of Ohio, and elsewhere, passing through the States of New York, New Jersey, Pennsylvania, and Ohio.

Third. Your petitioner charges that during the time aforesaid, to wit, on or about July 1, 1913, at and within the Southern Dist.ict of New York, said Erie Railroad Company, in violation of the provisions of the first section of the act to regulate commerce approved February 4, 1887, as amended, did unlawfully issue and give to one H. J. Ketcham an interstate free pass over and upon the interstate lines and routes of transportation of the said Erie Railroad Company, and that the said H. J. Ketcham was not at the time aforesaid, nor has he at any time been, and is not now, an employee or a member of the family of an employee, or an officer, agent, surgeon, physician, or an attorney at law of said Erie Railroad Company, nor at any time has he been, nor is he now, in any other manner within one of the excepted classes to which, under the provisions of the said act to regulate commerce, free interstate passes might lawfully be issued by the said Erie Railroad Company; the said H. J. Ketcham being at the

time aforesaid, and still being, the American agent of the Great Eastern Railway of England. That the said free interstate pass was issued, as aforesaid, at the request of the Great Eastern Railway of England, and by reason, and because of the employment of the said H. J. Ketcham by the said Great Eastern Railway of England
7 in the capacity aforesaid, and in pursuance of a practice of interchanging free passes between the said Great Eastern Railway of England and the said Erie Railroad Company.

Fourth. That the said Great Eastern Railway of England is a common carrier under the laws of United Kingdom of Great Britain, and is engaged in carrying on its business only in England and between England and Holland and Belgium, and is not subject to the said act to regulate commerce. The said Great Eastern Railway of England does not receive freight on through bills of lading from American railroads which are subject to the act to regulate commerce, nor is it otherwise associated with any American railroad subject to said act in such manner that both are under a common control, management, or arrangement for the continuous carriage and shipment of passengers or property in interstate commerce; nor is the said Great Eastern Railway of England within the terms or meaning of the proviso in the first section of the act to regulate commerce, whereby common carriers subject to said act to regulate commerce may lawfully issue and interchange free passes and transportation for their respective officers, agents, and employees and their families.

Fifth. That at divers times since said pass was issued by the said Erie Railroad Company to the said H. J. Ketcham, the said H. J. Ketcham has obtained free transportation thereon, and by means thereof, over and upon the interstate lines and routes of the said Erie Railroad Company in violation of the provisions of section 1 of the said act to regulate commerce, and in further violation of section 6 of said act, whereby a carrier is forbidden to charge a less or different compensation for the transportation of passengers than the fares and rates specified and filed with the Interstate Com-
8 merce Commission of the United States, pursuant to the provisions of the said act to regulate commerce, and which fares and rates were in effect at the times such transportation took place.

Sixth. That while and during the time the said Erie Railroad Company was furnishing free interstate transportation over its railway lines and routes to the said H. J. Ketcham, American agent of the Great Eastern Railway of England, as aforesaid, the said Erie Railroad Company contemporaneously transported other persons over its said interstate lines and routes between the same points from and to which the said H. J. Ketcham was transported as aforesaid, and said Erie Railroad Company did exact and receive in money from such other persons for the transportation so furnished to them the full amount of the rates named in its schedule of rates, fares, and charges, duly filed with the Interstate Commerce Commission, and which were in force at the time such transportation was furnished,

and that in each instance the circumstances and conditions pertaining to the transportation furnished to, and the transportation services performed for, said H. J. Ketcham, were substantially similar to the circumstances and conditions furnished to, and the transportation services performed for, such other persons, as aforesaid, all of which was in violation of the provisions contained in the second section of the said act to regulate commerce.

Seventh. That while and during the time that the said Erie Railroad Company furnished to said H. J. Ketcham free interstate transportation, as aforesaid, the said Erie Railroad Company also contemporaneously carried many other persons over its lines and routes in interstate transportation, from which other persons it exacted
9 and received the full amount of the rates named in its schedule of rates, fares, and charges duly filed with the Interstate Commerce Commission and then in force, and that thereby the said H. J. Ketcham and the said Great Eastern Railway of England were given an undue and unreasonable preference and advantage, and the said other persons were subjected to undue and unreasonable prejudice and disadvantage, all of which was in violation of section 3 of the said act to regulate commerce.

Eighth. That all of the foregoing charges have been brought to the attention of the said Erie Railroad Company by officers or agents of the United States, but said Erie Railroad Company claims the right to issue said pass and refuses to withdraw or cancel the same, and your petitioner is informed and believes that the said Erie Railroad Company intends to continue to allow and permit the said H. J. Ketcham to use the said pass, and to afford and furnish to the said H. J. Ketcham interstate transportation at less than the published rates on file as aforesaid, and to discriminate unreasonably against other interstate passengers in violation of the act to regulate commerce as aforesaid, and of the acts amendatory thereof and supplemental thereto, and particularly in violation of sections 1, 2, 3, and 6 of the said act and of section 3 of the "Act to further regulate commerce with foreign nations and among the States," approved February 19, 1903.

Wherefore, your petitioner prays:

I. That a subpœna or other suitable process may issue according to the course of equity requiring the said Erie Railroad Company to appear before this honorable court, and then and there to make full, complete, and perfect answer to all the matters and things hereinabove stated and charged, as fully and particularly as if it
10 was specially interrogated in regard thereto, but not under oath, which is hereby waived.

II. That this honorable court will summarily inquire into this petition and on final hearing, upon being satisfied of the truth of the allegations contained herein, will enforce an observance of the published and filed tariffs of the said Erie Railroad Company, and forbid and enjoin the further execution or recognition by the said Erie Railroad Company of the terms of said pass, and require a discon-

tinuance of the unlawful practice of issuing free interstate passes to the employees of common carriers which are not subject to the act to regulate commerce, and that the judgment of this honorable court may be carried into effect by such orders, writs, and process as may be proper, and as is provided may be issued under the provisions of section 3 of said "Act to further regulate commerce with foreign nations and among the States," approved February 19, 1903.

III. That this honorable court will grant such other and further relief in the premises as to the court may seem meet and as justice and the equities of the cause may require.

And your petitioner will ever pray, etc.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York, Solicitor for Petitioner.

Office and post-office address, U. S. Court and Post Office Bldg., New York City, N. Y.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jan. 23, 1914.)

11 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, *vs.* ERIE RAILROAD COMPANY. } In Equity. No. 2. E. 11-66.

The clerk will please enter the appearance of the undersigned as solicitors for Erie Railroad Company, respondent in the above-entitled cause.

GEO. F. BROWNELL,
M. B. PIERCE,
Office and P. O. Address, 50 Church Street, New York City, N. Y.

February 11th, 1914.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 11, 1914.

12 United States District Court, for the Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER, *vs.* ERIE RAILROAD COMPANY, RESPONDENT. } In Equity. No. 2.

To the honorable the judges of the United States District Court for the Southern District of New York:

Erie Railroad Company, respondent herein, for its answer to the bill in equity in this proceeding, shows:

First. It admits and alleges that it is a corporation, organized and existing under the laws of the State of New York; and that it is,

and during the times stated in the bill was, a common carrier operating lines of railroad extending from, to, and between the places, among others, stated in said bill; and that it is engaged by itself, and also in connection with other common carriers, in the
13 transportation of passengers and property wholly by railroad (and partly by railroad and partly by water where both are used under a common control, management, or arrangement for a continuous carriage or shipment) from various States of the United States to other States, and from places in the United States to adjacent foreign countries, and from places in the United States through a foreign country to other places in the United States, and also in the transportation in like manner of property shipped from places in the United States to foreign countries and carried from such places to ports of trans-shipment, and shipped from foreign countries to places in the United States and carried to such places from ports of entry either in the United States or in adjacent foreign countries.

Second. It denies each and every allegation contained in paragraph third of said bill, except that it admits that at the time and place named it issued to H. J. Ketcham a pass over and upon its interstate lines and routes of transportation, and that the said H. J. Ketcham was not during the times named in said bill, and is not now an employe, or a member of the family of an employe, or an officer, agent, surgeon, physician, or attorney at law of this respondent, and it denies that the said H. J. Ketcham was not during the times named in said bill, and is not now within the exceptions qualifications provided by the act to regulate commerce to the prohibition therein contained against the issuance of free passes except in certain cases or within one of the excepted classes to members of which, under the provisions of the act to regulate commerce, approved February 4th, 1887, as amended, such
14 passes might lawfully be issued. It admits and alleges that said pass was issued at the request of the Great Eastern Railway of England on account of the said H. J. Ketcham's employment as American agent of said Great Eastern Railway of England, and in pursuance of a practice which has existed ever since many years before the passage of said act to regulate commerce, of interchanging passes between said Great Eastern Railway of England and this respondent, and its predecessors in interest, for their respective officers, agents, and employees. It denies that the issuing by it of said pass was or is in violation of the provisions of section 1 of said act, either in the respects alleged in the said bill or otherwise.

Third. It admits that the Great Eastern Railway of England is a common carrier under the laws of the United Kingdom of Great Britain, and is not subject to the said act to regulate commerce; that the said Great Eastern Railway of England does not receive freight on through bills of lading from American railroads which are subject to the act to regulate commerce, nor is it otherwise associated with any American railroad subject to said act, in such manner that both are under a common control, management, or arrangement for the

continuous carriage and shipment of passengers or property in interstate commerce, but it denies that the said Great Eastern Railway of England is engaged in carrying on its business only in England and between England and Holland and Belgium, and alleges that said Great Eastern Railway of England maintains an office in the city and State of New York where a part of its business is carried on. It denies that said Great Eastern Railway of England is not
15 within the terms or meaning of the proviso in the first section of the act to regulate commerce, and alleges that said Great Eastern Railway of England is a common carrier within the meaning of that term as used in said proviso in said section 1 of said act which reads as follows: "Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers and their families," and further alleges that said Great Eastern Railway of England is a railroad company within the meaning of the provision of section 22 of the act to regulate commerce, which reads as follows: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

Fourth. It admits that the said H. J. Ketcham has, by means of said pass so interchanged and issued for him, obtained transportation over and upon its interstate lines and routes, and been transported by it without its exaction from him of the rates of fare specified in the tariffs filed pursuant to the provisions of the said act to regulate commerce, and in effect at the time; but it denies that the said H. J. Ketcham has at any time obtained free transportation from it by reason of the matters alleged in paragraph fifth of said bill or of any other matters, in violation of the said act to regulate commerce, either in the respects alleged in said paragraph fifth, or in any other respect.

16 Fifth. It denies that it has violated the provisions of the second section of the act to regulate commerce either in the respect alleged in paragraph sixth of the bill or in any other respect. It admits that while furnishing transportation over its interstate railway lines and routes to the said H. J. Ketcham, for whom a pass had been so interchanged and issued, it contemporaneously transported other persons over its said lines and routes between the same points and exacted and received in money from such other persons for the transportation so furnished to them the full amount of the rates named in its schedules of rates, fares, and charges duly filed with the Interstate Commerce Commission and in force and effect at such times; but it denies that in such instances the circumstances and conditions pertaining to the transportation furnished and the transportation service performed for said H. J. Ketcham were substantially similar to the circumstances and conditions pertaining to the transportation furnished to and the transportation service performed

for such other persons as aforesaid, or that said H. J. Ketcham or the Great Eastern Railway of England was given any undue or unreasonable preference or advantage, or that said other persons were subjected to any undue or unreasonable prejudice or disadvantage, in violation of section 3 of said act to regulate commerce, or otherwise.

Sixth. It admits that the charges contained in said bill have been brought to the attention of this respondent, and that it claims the right to continue to interchange passes with said Great Eastern Railway of England for their officers, agents, and employes, including the said H. J. Ketcham, respectively, and by means of such inter-
17 change to afford to said officers, agents, and employees, including said H. J. Ketcham, interstate transportation without exacting from them or him the published rates on file for the transportation of passengers generally, and to secure for its officers, agents, and employes passes or reduced-rate transportation by said Great Eastern Railway of England; and that it intends to so continue unless said interchange of transportation is found to be unlawful; but it denies that such interchange or such transportation constitutes an unreasonable or other discrimination against other interstate passengers in violation of the act to regulate commerce, or of the acts amendatory thereof and supplemental thereto, either in the respects alleged in paragraph eighth of said bill or in any other respect.

Seventh. For further answer to the bill in this case this respondent alleges:

Said Great Eastern Railway of England was at the time of the interchange, issuance, and use of said pass for and by H. J. Ketcham, and is now, a common carrier by railroad under the common law and the acts of the Parliament of the United Kingdom of Great Britain. Its line of railroad is located in England, but it also operates a line of boats known as the British Royal Mail Route to the Hook of Holland and Antwerp, Belgium. It transports freight from points on its line of railroad in the interior of England to the seaboard, and particularly to London, for export to and through the United States, a large part of which freight is transported by this respondent after its arrival in the United States. This respondent is interested in this character of freight traffic originating on the line of the Great
18 Eastern Railway of England, and solicits such traffic for routing over its line of railroad to its destination in the United States.

The rail carriers located in adjacent foreign countries and in European countries carry freight traffic which has been carried on a portion of its transportation by the rail carriers of the United States, and vice versa. Consignments of freight are carried in continuous transportation without intervention of shipper or consignee from points of shipment in the United States by railroad carriers of this country to the seaboard, thence by ocean carrier to the ports of such adjacent foreign countries and European countries and thence

by foreign rail carriers to point of destination, and shipments originating at interior points in such countries are handled in the same way in reverse order. Consignments of freight originating on the Great Eastern Railway of England and on the lines of this respondent are handled in this way.

This respondent maintains offices for the solicitation of traffic in the city of London and in Liverpool, England, and employs T. W. Jacobs as its European traffic manager. He holds an annual pass, good for carriage over the lines of the Great Eastern Railway of England, and uses said pass in travelling over those lines in the business of this respondent. The Great Eastern Railway of England is interested in freight traffic transported over the line of this respondent and other rail carriers in the United States to the eastern seaboard of the United States for export, to the extent that it does transport such freight destined to points upon its lines and is likewise interested in passenger traffic so transported.

Messrs. Thomas Cook & Son are the agents of both this respondent and the Great Eastern Railway of England in selling passen-
19 ger tickets, and tickets are sold by them good for passage over the Great Eastern Railway of England, the intermediate ocean carrier, and the lines of this respondent, and vice versa. Messrs. Thomas Cook & Son account to each carrier separately for the transportation so sold by them. The Great Eastern Railway of England is interested in passenger traffic which passes over the lines of this respondent, and this respondent has a like interest in passenger business which passes over the lines of the Great Eastern Railway of England. The said H. J. Ketcham travels over the lines of this respondent for the purpose of soliciting passenger business for the Great Eastern Railway of England and routes many passengers who have travelled over the lines of this respondent via the Great Eastern Railway of England to their destinations in England.

Respondent further alleges that said pass so interchanged and issued for the said H. J. Ketcham was lawfully issued under the proviso of section 1 of the act to regulate commerce, permitting the interchange of passes for the officers, agents, and employes of common carriers and their families. Said Great Eastern Railway of England is, and at the time of the issuance of said pass was, a common carrier within the meaning of said proviso. Also said pass was lawfully issued under the provision contained in section 22 of said act to regulate commerce, authorizing the principal officers of railroad companies to exchange passes or tickets with other railroad companies for their officers and employes. That the Great Eastern Railway of England was at and during the times referred to in said bill, and is now, a railroad company within the meaning of said provision in said section 22 of said act. Said pass was interchanged with said
20 Great Eastern Railway of England and issued for H. J. Ketcham at the request of a principal officer of said Great Eastern Railway of England, and in exchange for passes or reduced-rate transportation given by said Great Eastern Railway of England

at the request of a principal officer of this respondent for officers, agents, and employes of this respondent. For many years prior to and ever since the passage of said act to regulate commerce the railroad carriers in the United States in general, including this respondent and its predecessors in interest, have interchanged with other common carriers engaged in the transportation of passengers and property, including the Great Eastern Railway of England and other railroads of adjacent foreign and European countries, some of which are owned and operated by foreign governments, passes and reduced-rate transportation for officers, agents, and employes of their respective companies, subject to and in accordance with the rules and regulations of the respective carriers. Said passes so interchanged by it and such other railroad companies generally have always been on the condition that the persons for whom the same were issued and using the same voluntarily assumed all risk of accidents and agreed that the railroad company should not be liable under any circumstances, whether of negligence of such company or its agents or otherwise, for any injury to the person or property of such users, and the rights and privileges of the persons for whom such passes have been issued with respect to the transportation afforded them thereunder have been and are limited in other material respects as compared with the rights and privileges of passengers for hire transported by this respondent and other railroad companies generally for the regular tariff rates of fare. No distinction has been made or recognized with respect to the right to so interchange and issue passes for officers, agents, and employes of such carriers engaged in the transportation of persons and property based upon the fact that the situs of the lines of railroad of such common carriers is not within the United States or that such common carriers are engaged in the transportation of persons and property only to and from but not within the United States, although the number and amount of passes and reduced-rate transportation so interchanged and issued by this respondent and other railroad companies in the United States for officers, agents, and employes of the Great Eastern Railway of England and such other common carriers by railroad similarly situated, or issued in such interchange by said Great Eastern Railway of England, or other foreign railroads, for officers, agents, and employes of this respondent and other railroad companies in the United States, has been and naturally is very limited as compared with the number and amount thereof interchanged between and issued by this respondent and other railroad companies in the United States for officers, agents, and employes of other railroad companies in the United States.

21

Since the passage of the act to regulate commerce no distinction has ever been recognized or made with respect to the right to so interchange and issue passes between railroad companies and other common carriers by railroad or by water, including said Great Eastern Railway of England, on the basis of the fact that such other common carriers are not subject to the act to regulate commerce or

have not united with a carrier subject to that act for the inter-
22 state transportation of passengers or property by concurrence in one or more tariffs published and filed with the Interstate Commerce Commission.

Said custom and practice of this respondent and railroad companies generally of interchanging with the Great Eastern Railway of England and other foreign railroads passes and reduced-rate transportation for their respective officers, agents, and employes to the limited extent above stated is one which as a matter of common knowledge has existed and been openly followed by this respondent and other railroads of the United States generally for many years. Its existence was well and commonly known long before the passage of the act to regulate commerce, by the terms of which its continuance was permitted. It rests upon the same considerations, including considerations of business policy, which have always been recognized as justifying the interchange and issuance by and between railroad companies of this country of passes and reduced-rate transportation for officers, agents, and employes of other American railroad companies, and Congress by the above-mentioned provisos contained in sections 1 and 22 of the act to regulate commerce, as amended, recognized and permitted the continuance of the custom and practice.

Wherefore this respondent prays that the bill herein be dismissed at the petitioner's cost, and for such other action as may be appropriate.

ERIE RAILROAD COMPANY,
By GEO. F. BROWNELL,
M. B. PIERCE,
Its Solicitors.

Office and post-office address, 50 Church Street, New York City, N. Y.

February 5, 1914.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, N. Y., February 11, 1914. H. Snowden Marshall, United States attorney for the Southern District of New York, solicitor for petitioner. U. S. District Court, S. D. of N. Y. Filed Feb. 11, 1914.

23 United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER,
vs.
ERIE RAILROAD COMPANY, RESPONDENT. } Action No. 2. E 11-66.

SIRS: Please take notice that upon March 20, 1914, at 10.30 o'clock a. m., or as soon thereafter as counsel may be heard, a motion will be made by the solicitor for the petitioner herein before one of the judges of the United States District Court for the Southern District of New York at a session of said District Court to be held in the United States Court and Post Office Building, in the Borough of

Manhattan, city of New York, for judgment upon the bill and answer herein and for the relief prayed for in the petitioner's bill.

March 14, 1914.

Yours, &c.,

H. SNOWDEN MARSHALL,
United States Attorney for the Southern,
District of New York.

Office and post-office address, U. S. Court and Post Office Building, Borough of Manhattan, city of New York.

To GEORGE F. BROWNELL, Esq., and
M. B. PIERCE, Esq.,
Solicitors for the Respondent,
50 Church Street, New York, N. Y.

Filed Apr. 7, 1914.

24 MARCH 20, 1914.

The court is opened by proclamation.

Present, Hon. Charles M. Hough, D. J.

UNITED STATES
vs.
ERIE RAILROAD COMPANY. } Actions No. 1 and No. 2.

Causes coming on for hearing on motions for judgment on the pleadings.

Assistant U. S. Attorney Knox, for the motion.

Messrs. Geo. F. Brownell and M. B. Pierce, opposed.

These cases, by consent of both parties, were brought on for hearing before Hon. Charles M. Hough, U. S. district judge, and the following stipulation was made:

"It is stipulated and agreed between counsel in the above-entitled causes, that for the determination of the issues in this proceeding the facts shall be those facts alleged in the bill, not denied or qualified in the answer, and those facts alleged and set out in the answer, that all of such facts are for the purposes of this proceeding only admitted to be true and correct."

25 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA,
vs.
ERIE RAILROAD COMPANY. } Action No. 1. (Issuing passes to agents of trans-Atlantic steamship lines.)
Action No. 2. (Issuing pass to agent Great Eastern Railway of England.)

Final hearings in equity; actions to restrain the continuance of the transportation privileges represented by the passes above referred to.

Mr. John C. Knox, Assistant U. S. Attorney, for complainant; Mr. George F. Brownell for defendant.

HOUGH, D. J.: From a date prior to 1887, and continuously since that time, the Erie Railroad has been in the habit of issuing passes to

certain agents or officials of the trans-Atlantic steamship lines using the port of New York. Between the railroad and steamship companies there has been an interchange of passes for the purpose of maintaining relations from which profit was desired. The steamship companies control much through freight; so does the Erie Railroad, and each hoped to get more freight through the influence of those gratified by said interchange of passes.

The Erie Railroad also maintains an agent in England, whose business it is to solicit through freight; he receives passes over the lines of the Great Eastern Railway of England, in return for which the defendant issues a pass over its lines to the American agent of the English railway. This arrangement likewise has continued
26 for many years and antedates 1887.

It is admitted that the defendant is a corporation engaged in interstate traffic, and is subject to the provisions of what is commonly known as the interstate-commerce law; and it is also admitted that neither the ocean carriers nor the Great Eastern Railway of England is subject to said act, although all are common carriers within the ordinary meaning of those words.

Section 22 of the interstate-commerce law has, from the passage of the first statute in 1887, contained these words:

"Nothing in this act shall be construed * * to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

Since the Hepburn Act of 1906, the first section of the interstate-commerce law has contained these words:

"No common carrier subject to the provisions of this act shall after January 1, 1907, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, * * * provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation."

The amendment of 1910 inserted the following words (next after those above quoted):

"And provided further that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange
27 thereof with each other for the officers, agents, employees and their families of such telegraph, telephone and cable lines and the officers, agents, employees and their families, of other common carriers subject to the provisions of this act."

The proviso of 1910 is evidently intended to cover the case of employees of cable, telegraph, and telephone lines, which were in that year brought within the purview of the interstate commerce law; but I am quite unable to see any reason for the rest of said proviso.

The object of these actions is to enjoin the defendant from continuing the long-standing practice above outlined because the common carriers or railroads referred to in the quoted sections of the law must be held to mean, not common carriers and railroads generally, but "common carriers subject to the provisions of this act."

These suits were laid before the Commerce Court and were dismissed without prejudice because the court was divided in opinion.

Shortly after the passage of the Hepburn Act this question came before the Interstate Commerce Commission (12 I. C. C. Rep., 39), and it was there plainly held that no interchange of passes would be permitted between ordinary common carriers or common carriers at common law and "common carriers subject to the provisions of this act."

The position of the commission is, in substance, that the general prohibition of the Hepburn Act is only modified by the proviso to the extent of "making a special exception of the giving of passes by way of interchange to the employees of any other common carrier subject to the act."

28 This seems to me assertion rather than reasoning, but there is really very little more to say about it. To decide this matter as one of law is making bricks without straw, for everyone admits that the object of the court must be to carry out the intent of the legislature; yet if by "intent" is meant conscious purpose, it is, I think, a safe presumption that Congress never considered the point here involved.

In the absence of any real intent it is the habit of courts to endeavor to ascertain whether from the language used an imputed intent can be spelled out.

Applying this method it is a fair query to ask whether the context indicates throughout the act that "common carriers" is to be synonymous with "common carriers subject to the provisions of this act."

As amended to date I find the following instances of the use of the phrase "common carriers" in illustrative positions:

In section 1 there is a proviso:

"That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

Here "common carriers" must refer to common carriers generally, for otherwise telegraph and telephone companies might find themselves hampered in extending their business with concerns entirely unconnected with interstate commerce.

The penal provision which is a part of the antipass legislation begins with the expression:

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor," etc.

Here the phrase evidently refers only to carriers subject "to the provisions of this act."

29 The provisions of section 1 relating to private sidings and lateral branch lines declare that "if any common carrier shall fail to install and operate any such switch," the commission shall investigate the matter and make an order "directing the common carrier to comply with the provisions of this section."

Here evidently the phrase can refer only to carriers "subject to the provisions of this act."

Section 3, relating to interchange of traffic, does not consistently use the phrase "carrier subject to the provisions of this act," yet I think it plain that in every instance where the phrase "carrier" is used it means "carrier subject to the provisions of this act."

Section 5 (the antipooling provision) prohibits combinations "with any other common carrier or carriers," which phrase, I think, is plainly intended to cover any and all carriers, whether the same be subject to the provisions of the interstate-commerce law or not.

Section 6 (relating to published tariffs) does not always use the phrase "common carrier subject to the provisions of this act," but in my judgment it can only mean such carrier as may be seen from the context.

This is especially noticeable in the subsection relating to the expedition of military traffic in time of war, which declares that "carriers shall adopt every means within their control to facilitate and expedite the military traffic."

This can only refer to "carriers subject to the provisions of this act."

Section 13, which gives to "any common carrier" the right to complain of the acts or omissions of "any common carrier
30 subject to the provisions of this act," specifically puts the two classes of carriers in contradistinction.

In section 15 it is provided as proper for a common carrier to give information "to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers."

The phrase "another carrier" must mean in many instances a carrier not subject to the provisions of this act.

The reparation section (No. 16) provides that the commission may make an order "directing the carrier to pay to the complainant the sum to which he is entitled."

This, of course, can only refer to a "carrier subject to the provision of this act," and the same may be said of the subsequent portions of the same section relating to the duty of carriers to comply with the commission's order, the penalty upon a carrier for neglecting to obey an order, and the right of the commission to apply for a court decree enforcing an order.

The so-called Carmack amendment to section 20 no where employs the phrase "carrier subject to the provisions of this act," yet every carrier affected is in a certain sense within the provisions of the act. The language of this amendment, however, does not seem to me en-

lightening, because it is really new and different legislation not germane to the general purposes of the statute.

The foregoing examination of the act satisfies me that no attempt has been made to give to the phrases "common carrier" and "common carrier subject to the provisions of this act" an identical
31 meaning; and all arguments based on such identity fail.
fail.

It is another admitted canon of interpretation that the statute is to be construed with reference to the object intended to be accomplished. The interstate-commerce law is clearly a remedial act, and is to be benevolently interpreted; but it can hardly be said that it has been the intention of even its most affectionate supporters to bring all the business or all the operations of the "carriers subject to the provisions of this act" within the compulsion of the statute. So far as many heads of legislation are concerned, it is historically known that only a small proportion of our legislators have been willing to extend the power of Congress over interstate commerce to its limit. It has hitherto been deemed sufficient to legislate over a limited field only; and I find it impossible to perceive either in the language of the act, the history of its preparation, or the literature which has grown up around it any clear intent to upset the settled habit, not only of this defendant but all American carriers, of seeking or encouraging business in foreign fields, or fields not within the power of Congress, by methods which are still permissible within the congressional field of regulation. Admittedly the Erie Railroad can exchange passes with the New York Central, and why it is obnoxious to the object of the interstate-commerce law for the Erie to do the same thing with foreign carriers who are in business relations with it is more than I can see.

Indeed, the "object" of a statute rarely means more than a supposed governmental policy, and it has been said that such policy is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes. (Hadden vs. Collector, 5 Wall., 107.)

32 The argument of inconvenience is easy to advance, but very misleading. In doubtful cases it is true that a statutory construction occasioning great inconvenience or productive of inequality and injustice is not to be preferred if another and more reasonable construction can be found. (Knowlton vs. Moore, 178 U. S., 41.) It is vigorously urged here as matter of notoriety, that there are already municipalities in this country which are in a sense common carriers, in that (in New York and Boston) they maintain ferries for hire, and also that the United States itself is reputed to own a railway common carrier in the Canal Zone, and is about to construct and operate a similar common carrier in Alaska. On these facts the argument is based that every official of the United States, from the highest to the lowest, and all the officers or employees of New York and Boston, may be favored with passes, to the great detriment of the public.

The jumping of such intellectual fences as these may be left until we come to them. To my mind the argument only shows how fallacious is reasoning ab inconvenienti.

To sum this matter up, it is plain that the contention of the Government is not to be found in the letter of the statute; nor is it discoverable in the spirit thereof, because there is no evidence of actual intent on the part of the legislature—because, viewing he whole act, the phrase "common carrier" is not and was not intended to be synonymous with the phrase "common carrier subject to the provisions of this act"—and because there is no reason shown why Congress should be thought to have given the privilege of exchanging passes with one kind of common carrier and not with another, when such exchanges are made and always have been made with all
33 common carriers for the same reasons, viz, a desire to curry favor with persons having business to place.

If these well-known reasons no longer meet approval, if mutual back-scratching has become sinful, the remedy is another statute, not stretching the present one.

Bills dismissed.

April 3, 1914.

C. M. HOUGH, D. J.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Apr. 3, 1914.

34 At a stated term of the United States District Court, held in and for the Southern District of New York, at the court rooms of said court in the post-office building, city of New York, on the 21st day of April, 1914.

Present, Hon. Charles M. Hough, district judge.

UNITED STATES OF AMERICA
versus
ERIE RAILROAD COMPANY.

In Equity. Actions Nos. 1 and 2. E-11-65 and E-11-66.

These causes came on to be heard together at the March term and were argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed that the bills be, and the same hereby are, dismissed.

C. M. HOUGH,
United States District Judge.

Dated New York, April 21, 1914.

Objections as to notice waived.

Approved as to form.

H. SNOWDEN MARSHALL,
United States Attorney, Solicitor for Petitioner.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Apr. 22, 1914.)

35 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, petitioner, *against* ERIE RAILROAD COMPANY, respondent.	In Equity. Action No. 2. E–11–66. Petition for appeal.

To the honorable judges of the United States District Court for the Southern District of New York:

Comes now the United States of America, by H. Snowden Marshall, United States attorney for the Southern District of New York, its solicitor of record, and the United States of America, conceiving itself to be aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause, under date of April twenty-second, nineteen hundred and fourteen, in the manner and instances set forth in the assignment of errors filed in said cause, does hereby appeal to the present term of the Supreme Court of the United States from said order and decree, and each and every part thereof; and that the United States of America prays that this, its petition for its said appeal, may be allowed; that a transcript of so much of the record on which said order and decree so appealed was made, and the subsequent proceedings and papers in this suit as may be deemed sufficient by this court, duly authenticated,
36 may be sent to the Supreme Court of the United States, and that said order and decree, and each and every part thereof so appealed from, may be reversed.

New York, April 29, 1914.

H. SNOWDEN MARSHALL,
United States Attorney,
Solicitor for United States of America.

Office & post-office address, Room 50, U. S. Courthouse and Post Office Building, Borough of Manhattan, city of New York.

The foregoing appeal is hereby allowed.

C. M. HOUGH,
U. S. District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Apr. 29, 1914.)

37 United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA, PETITIONER, *against* ERIE RAILROAD COMPANY, RESPONDENT.	In Equity. Action No. 2. E–11–66. Assignment of errors.

Now comes the petitioner, by H. Snowden Marshall, United States attorney for the Southern District of New York, its solicitor, and makes and files the following assignment of errors, which it alleges

occurred on the trial of this action, and upon which it will rely on the prosecution of its appeal:

First. The court erred in holding and deciding that the Great Eastern Railway of England was a common carrier within the terms and meaning of the words "common carriers" as the same are used in the first proviso of section 1 of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, as amended.

Second. The court erred in holding and deciding that the Erie Railroad Company lawfully issued and gave a free interstate pass to the American agent of the Great Eastern Railway of England for the free transportation of said agent over and upon the interstate lines and routes of transportation of said Erie Railroad Company, under the provisions of section 1 of the said act to regulate commerce, as amended.

Third. The court erred in holding and deciding that Erie
38 Railroad Company and Great Eastern Railway *Railway* of England might lawfully interchange passes for their respective officers, agents, and employees under the provisions of the first proviso of section 1 of said act to regulate commerce, as amended.

Fourth. The court erred in failing to hold and decide that Erie Railroad Company violated section 2 of said act to regulate commerce, as amended, by having furnished free interstate transportation to said American agent of Great Eastern Railway of England, and, contemporaneously therewith, having furnished interstate transportation to other persons between the same points, from and to which said agent was transported, from which other persons said Erie Railroad Company exacted and received in money the full amount of the rates named in the schedule of rates, fares, and charges duly filed by said Erie Railroad Company with the Interstate Commerce Commission, and in force and effect at the time such transportation was furnished as aforesaid.

Fifth. The court erred in failing to hold and decide that Erie Railroad Company violated section 3 of said act to regulate commerce, as amended, by having furnished free interstate transportation to said agent as aforesaid, and, contemporaneously therewith, having furnished other persons transportation over and upon its interstate lines and routes under the conditions hereinbefore set out.

Sixth. The court erred in failing to hold and decide that Erie Railroad Company violated section 6 of said act to regulate commerce, as amended, in having furnished free transportation
39 over and upon its interstate lines and routes to said American agent of Great Eastern Railway of England, upon and by reason of a pass issued and given to said agent by said Erie Railroad Company.

Seventh. The court erred in failing to hold and decide that that portion of section 22 of the act to regulate commerce, as amended, reading:

"Nothing in this act shall be construed to prevent railroads from giving free carriage to their officers and employees, or to prevent the

principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees,"

was repealed by the enactment of the first proviso of section 1 of the act to regulate commerce.

Eighth. The court erred in holding and deciding that the Great Eastern Railway of England was a railroad company within the meaning of that portion of section 22 of the act to regulate commerce, as amended, reading:

"Nothing in this act shall be construed to prevent railroads from giving free carriage to their officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

Ninth. The court erred in holding and deciding that the Erie Railroad Company and Great Eastern Railway of England might lawfully exchange passes or tickets for their respective officers and employees under the provision of section 22 of the said act to regulate commerce, as amended.

Tenth. The court erred in holding and deciding that Erie Railroad Company lawfully gave and issued a free interstate pass to the American agent of Great Eastern Railway of England for the free transportation of said agent over and upon the interstate lines and routes of transportation of said Erie Railroad Company under the provision of section 22 of said act to regulate commerce, as amended.

Eleventh. The court erred in failing to hold and decide that the refusal of said Erie Railroad Company to withdraw and cancel the free interstate pass issued to said agent of the Great Eastern Railway of England, and that the expressed intention of said Erie Railroad Company to continue to allow and permit the said agent to use said pass and to furnish to him free transportation over and upon its interstate lines and routes on account of and by reason of said pass entitled the petitioner herein to equitable relief.

Twelfth. The court erred in failing to direct and enforce an observance by the Erie Railroad Company of its filed and published tariffs.

Thirteenth. The court erred in failing to forbid and enjoin the further execution or recognition by said Erie Railroad Company of the pass issued to the said agent of Great Eastern Railway of England as aforesaid.

Fourteenth. The court erred in failing to require and direct the discontinuance by said Erie Railroad Company of its practice of issuing free interstate passes to the employees of common carriers that are not subject to the provisions of the said act to regulate commerce, as amended.

Fifteenth. The court erred in directing and entering a decree in this action, dismissing the petitioner's bill.

41 And the petitioner prays that the decree aforesaid for the errors aforesaid and for the other errors in the record and proceedings herein may be reversed and for naught held and esteemed, and that it may be restored to all things that it hath lost by reason of said decree.

Dated April 29, 1914.

H. SNOWDEN MARSHALL,
United States Attorney, Attorney for Petitioner.

Office & P. O. address, Room 50, U. S. Court House & P. O. Building, Borough of Manhattan, city of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Apr. 29, 1914.)

42 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER,
against
ERIE RAILROAD COMPANY, RESPONDENT.
} In Equity. Action No. 2. E–11–66.

Citation.

By the Honorable Charles M. Hough, one of the justices of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To the Erie Railroad Company, and George F. Brownell and M. B. Pierce, solicitors, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 28th day of May, 1914, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern District of New York, from a judgment and decree made on or about April 22,
43 1914, in a certain proceeding wherein the United States of America is the petitioner and the Erie Railroad Company is respondent, and wherein the United States of America is the appellant and you are the respondent, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 29th day of April, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

C. M. HOUGH,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

E 11–66. Original form No. 366.

U. S. District Court, Southern District of New York.

UNITED STATES,
versus
ERIE RAILROAD CO. } No. 2.

Citation.

H. SNOWDEN MARSHALL,
United States Attorney, Attorney for U. S.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, Apr. 29, 1914. Geo. F. Brownell, M. B. Pierce, sols. for resp. U. S. District Court, S. D. of N. Y. Filed May 1, 1914.

45 UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES OF AMERICA, PETITIONER,
vs.
ERIE RAILROAD COMPANY, RESPONDENT.
} In Equity, 11–66. Action No. 2.

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 19th day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-eighth.

[SEAL.] ALEX GILCHRIST, Jr., *Clerk.*

(Indorsement on cover:) File No. 24,232. S. New York, D. C. U. S. Term No. 494. The United States, appellant, vs. Erie Railroad Company. Filed May 22d, 1914. File No. 24,232.

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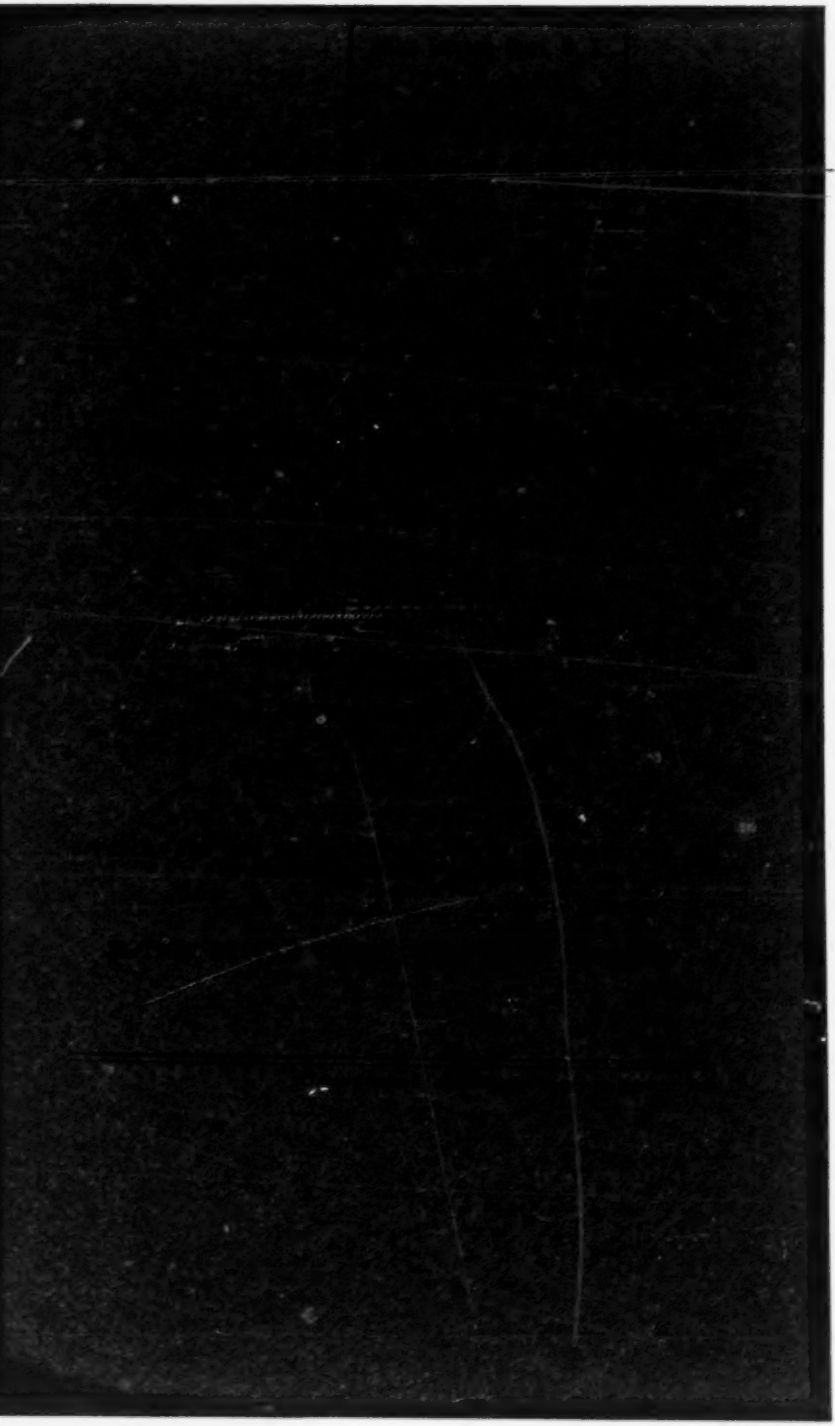

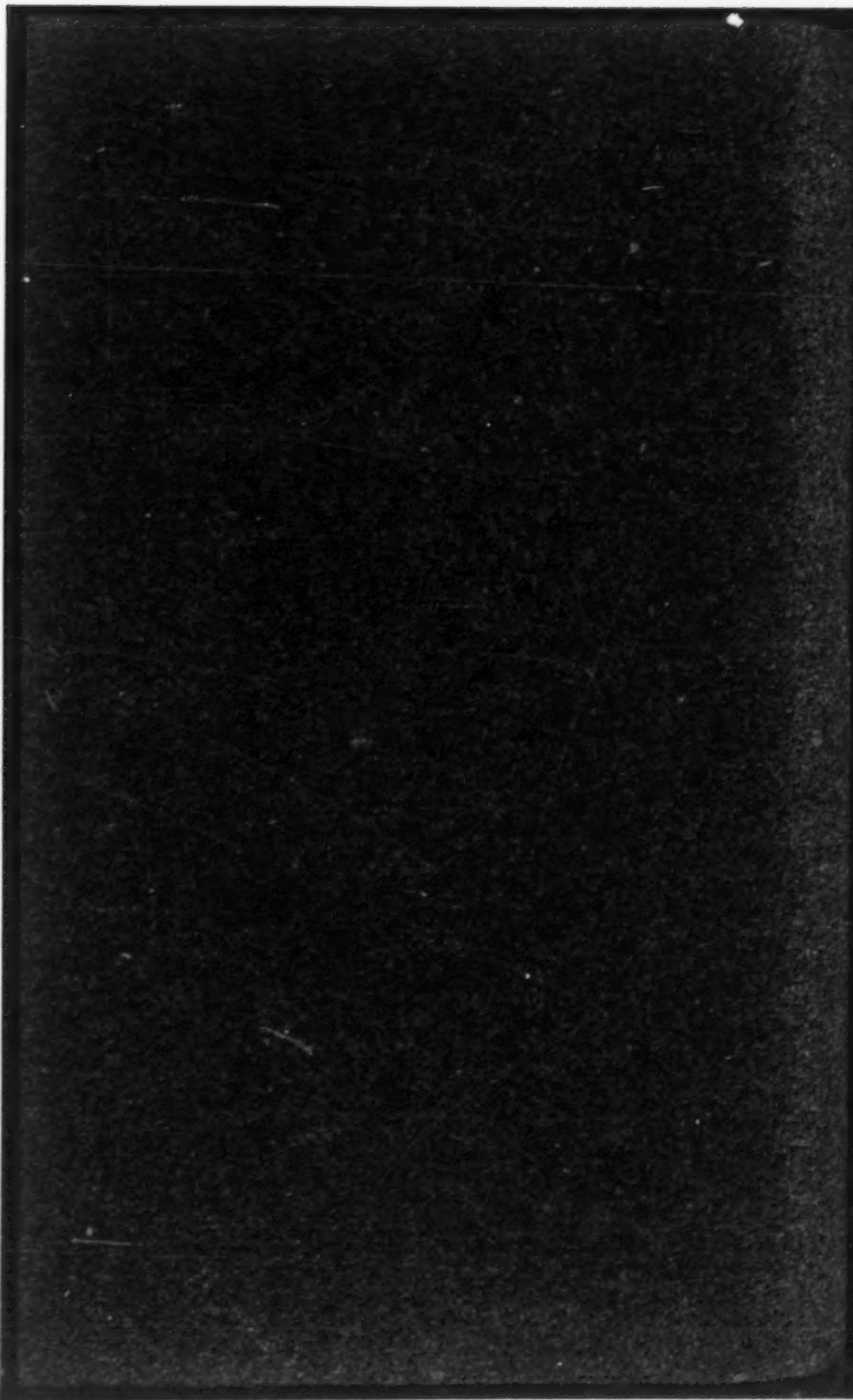

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, APPELLANT,
v.
ERIE RAILROAD COMPANY. } No. 493.

THE UNITED STATES, APPELLANT,
v.
ERIE RAILROAD COMPANY. } No. 494.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled causes for joint hearing on a day convenient to the court during the present term.

These actions were proceedings in equity instituted by the United States pursuant to the provisions of section 3 of the act of February 19, 1903, known as the "Elkins law."

In No. 493 the bill charged the Erie Railroad Company with having given at various times to

agents of various trans-Atlantic steamship lines not subject to the act to regulate commerce of February 4, 1887, as amended, free interstate passes over its lines in violation of said act, and prayed that the said Erie Railroad Company be enjoined from further issuing such passes to the employees of common carriers not subject to said act.

In No. 494, the bill is identically the same except that it charged the Erie Railroad Company with having given to H. J. Ketcham, the American agent of the Great Eastern Railway of England, a common carrier not subject to said act, an interstate free pass and other free transportation over the lines of said Erie Railroad Company.

The actions were heard together in the District Court and the bills dismissed, the court holding that a common carrier subject to the act to regulate commerce, as amended, was not limited to the exchange of passes with other carriers equally subject to the act, but was authorized to exchange passes with trans-Atlantic steamship lines and foreign railroads not subject to the act.

As the question involved affects the general administration of the interstate commerce act, it is a matter of public importance that it be settled as promptly as possible.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1914.

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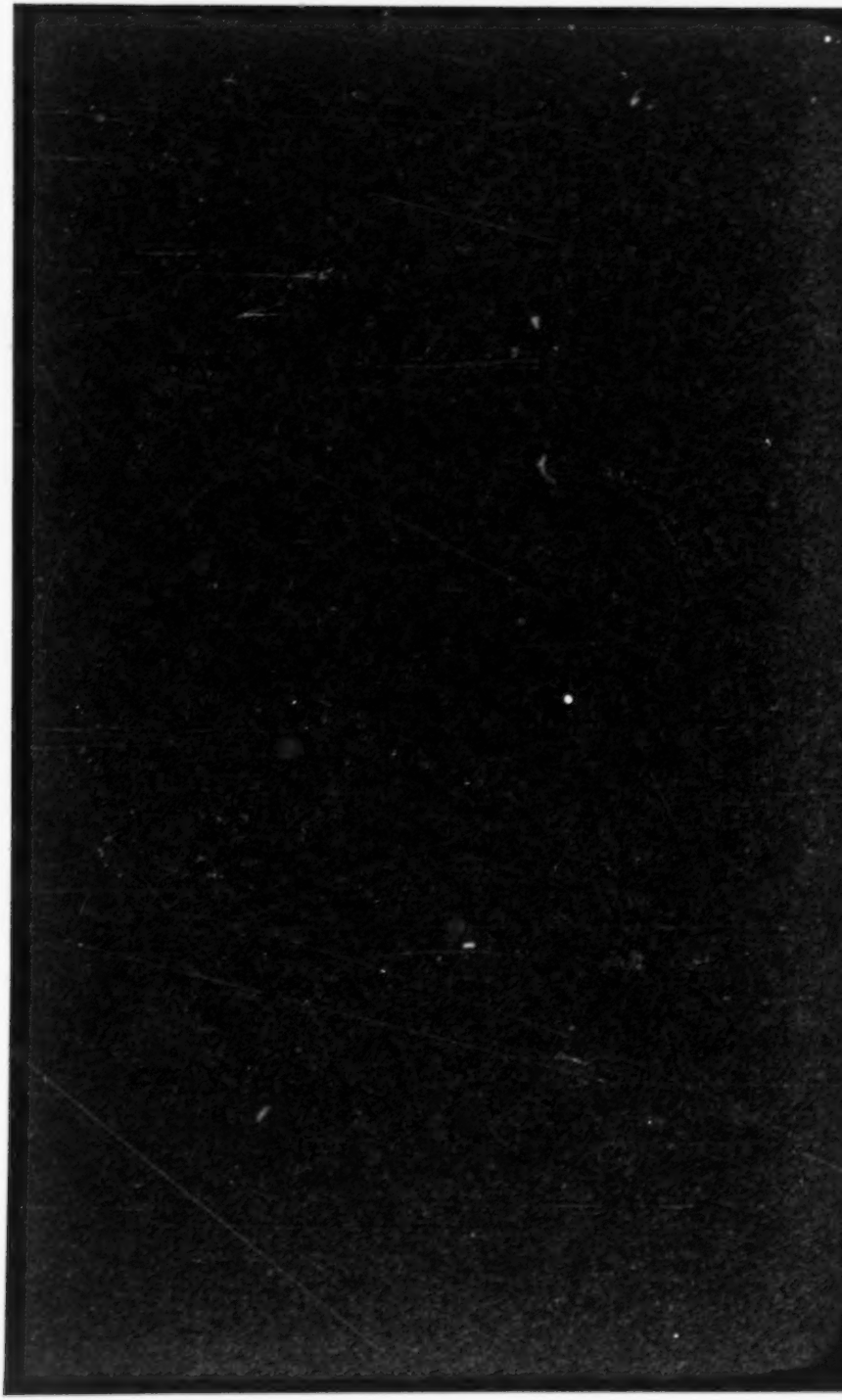

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

Nos. 493 and 494.

THE UNITED STATES, APPELLANT,

v.

ERIE RAILROAD COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are direct appeals from a decree of the United States District Court for the Southern District of New York dismissing two bills filed by the United States to enjoin the Erie Railroad Company from issuing passes to employees of common carriers *not* subject to the Act to Regulate Commerce, in alleged violation of the so-called Anti-Pass Provision of section 1 of that Act, as amended June 29, 1906, 34 Stat., 584, c. 3591, and also in alleged violation of sections 2 and 3, 24 Stat., 379, c. 104, and of section 6 as amended June 29, 1906, 34 Stat.,

584, 586, c. 3591, prohibiting rebates and preferences.

No jurisdictional questions are raised.

The bills were filed pursuant to section 3 of the Act to Further Regulate Commerce, 32 Stat., 847, 848, c. 708, which authorizes proceedings in equity to prevent common carriers from departing from their published rates or from committing any discrimination forbidden by law. (Rec., No. 493, p. 3; No. 494, p. 3; *United States* v. *Missouri Pacific R. Co.,* 189 U. S., 274; *N. Y., N. H. & H. R. Co.* v. *I. C. C.,* 200 U. S., 361; *American Express Co.* v. *United States,* 212 U. S., 522; *United States* v. *Union Stock Yard,* 226 U. S., 286; *United States* v. *Milwaukee Refrigerator Transit Co.,* 145 Fed., 1007.) The giving of passes for free transportation constitutes a departure from the carrier's published rates and a discrimination against other passengers. *(Re charge to grand jury,* 66 Fed., 146; *Ex parte Koehler,* 31 Fed., 315, 321–322; *Re carriage of persons free by B. & M. R. Co.,* 5 I. C. C., 69; *Griffee* v. *B. & M. R. Co.,* 2 I. C. C., 301; *Slater* v. *N. P. Ry. Co.,* 2 I. C. C., 359; *Harvey* v. *L. & N. R. R. Co.,* 5 I. C. C., 153; *Milk Prod. Ass'n.* v. *D. L. & W. R. Co.,* 7 I. C. C., 92.)

Originally the bills were filed in the Commerce Court, which dismissed them without prejudice, the members of the Court being equally divided in opinion. (Rec., No. 493, p. 15.) Upon the abolition of the Commerce Court and the transfer of its juris-

diction to the district courts, 38 Stat., 219, c. 32, the bills were re-filed in the United States District Court for the Southern District of New York.

The direct appeals to this Court are authorized by section 2 of the Commerce Court Act, 36 Stat., 539, 542, c. 309, as amended by the Act abolishing the Commerce Court, 38 Stat., 219, c. 32; and also by section 2 of the so-called Expediting Act, 32 Stat., 823, c. 544, as amended by section 291 of the Judicial Code, 36 Stat., 1087, 1167, c. 231.

The facts are not in dispute, both cases having been submitted on bill and answer pursuant to stipulation. (Rec., No. 493, p. 14; Rec., No. 494, p. 13.)

The petition in No. 493 alleges that the Erie Railroad Company is a common carrier subject to the Act to Regulate Commerce; that in pursuance of a standing practice it issues passes for transportation to certain of the officers, agents and employees of various trans-Atlantic steamship lines; that these steamship lines are *not* common carriers subject to the Act to Regulate Commerce; that the persons to whom these passes are issued by the Erie Railroad Company are transported over its lines free of charge, whereas other passengers transported between the same points are required to pay the published fares; and finally that the Erie Railroad Company intends to continue the practice complained of unless enjoined. (Rec., No. 493, pp. 3, 4 and 5.)

The answer admits these allegations. (Rec., No. 493, pp. 6, 7 and 8.) It avers, however, that the Erie Railroad Company solicits for transportation over its lines freight brought to this country by the steamship lines; that the latter in turn solicit from shippers along the line of the Erie Railroad Company the transportation of their freight abroad; that a large amount of the traffic moved by the steamship companies is transported by the Erie Railroad Company after arrival in or before departure from the United States, as the case may be, some of it under through bills of lading; and that the interchange of passes between the officers and employees of carriers thus situated is based on considerations of business policy. (Rec., No. 493, pp. 9, 10, 11, and 12.)

The answer further avers that the issuance of passes by the Erie Railroad Company to officers, agents and employees of these trans-Atlantic steamship lines is authorized by the following exception to the Anti-Pass Provision of section 1 of the Act to Regulate Commerce (Rec., No. 493, pp. 7, 8, and 12):

> *Provided*, That this provision shall not be construed to prohibit the interchange of passes for officers, agents and employees of *common carriers*, and their families; * * *. (Sec. 1, 34 Stat., 585.) [Italics ours.]

The material facts in No. 494 are the same in substance as in No. 493, with the exception that the passes there in controversy were issued by the Erie

Railroad Company to an employee of the Great Eastern Railway of England.

The answer in No. 494 (Rec., 8, 12) also makes the additional defense that the Erie Railroad Company is authorized to issue passes to the employees of the Great Eastern Railway of England not only by the exception in section 1 of the Act to Regulate Commerce, above quoted, but also by an exception in section 22 of the Act as originally enacted, reading as follows:

> Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other *railroad companies* for their officers or employees. (24 Stat., 387.) [Italics ours.]

THE ISSUE.

The assignments of error (Rec., No. 493, pp. 20–22; Rec., No. 494, pp. 19–21), reduced to their essence, raise the single question—

Whether the expressions "common carriers" and "railroad companies" as used in the above quoted exceptions to the provisions of the Act to Regulate Commerce prohibiting passes, rebates and preferences, mean *all* common carriers and *all* railroad companies or only those *subject to the Act to Regulate Commerce.* In other words, under these exceptions, can a common carrier *subject to the*

Act give passes to the officers, agents, employees, and their families, of other common carriers of every kind and description the world over, or can it interchange passes only with other common carriers *subject to the Act?*

The contention of the Government is that these exceptions, properly construed, permit common carriers subject to the Act to interchange passes only with other common carriers subject to the Act.

THE ARGUMENT.

OUTLINE.

I. The construction of the disputed exception in the Anti-Pass Provision of section 1 of the Act to Regulate Commerce for which the Government contends is the construction which has been adopted by the Interstate Commerce Commission, the administrative body charged with the enforcement of that Act.

II. With the Commission's construction of that exception before it, Congress, in re-enacting in 1910 the Anti-Pass Provision, made no change whatever in the language of the exception.

III. The construction of a statue by the administrative body charged with its enforcement is always entitled to great weight, and when, as here, Congress has re-enacted the statute without altering the part construed, the administrative construction, unless plainly erroneous, must be taken as impliedly

ratified by Congress, and therefore as binding upon the courts.

IV. Not only is the Commission's construction not plainly erroneous but, on the contrary, it accords (1) with the sense in which the words in dispute are generally used in the statute, (2) with the context of the particular provision, and (3) with the purpose and spirit of the legislation.

V. The exception contained in Section 22 can have no broader operation than the exception contained in the Anti-Pass Provision of Section 1.

First Point.

THE CONSTRUCTION OF THE DISPUTED EXCEPTION IN THE ANTI-PASS PROVISION OF SECTION 1 OF THE ACT TO REGULATE COMMERCE FOR WHICH THE GOVERNMENT CONTENDS IS THE CONSTRUCTION WHICH HAS BEEN ADOPTED BY THE INTERSTATE COMMERCE COMMISSION, THE ADMINISTRATIVE BODY CHARGED WITH THE ENFORCEMENT OF THAT ACT.

The Anti-Pass Provision, which is set forth in full in the margin,* was enacted June 29, 1906 (34 Stat. 584). Only a few months later a petition by the Frank Parmelee Co., doing a large business in the transfer of passengers and baggage between the

*No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the neces-

various railroad stations in Chicago, asked the Commission for a ruling upon the question whether, under the exception contained in the provision, it had the right to interchange passes with these railroads for free transportation. The case was submitted February 5, 1907, and on March 25, 1907, the Commission rendered a full and carefully considered opinion holding that such an interchange of passes was not permissible, upon the express ground that the transfer company, though a common carrier, was not a carrier *subject to the Act.* (*In re Exchange of Free Transportation*, 12 I. C. C. 39, 44.)

The District Judge dismissed this opinion with the remark that it seemed to him " assertion rather than reasoning." (Rec. No. 493, p. 15.) On the contrary, it is a carefully reasoned and forceful statement of the grounds in support of the Commission's construction. We ask the Court to read the opinion in its entirety as an essential part of this case.

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sary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families;* nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation. [Italics ours.]

This opinion was reported in the usual manner and was immediately given additional publicity in the Commission's Annual Report to Congress for 1907 (pp. 27–28). It has been reaffirmed at least three times in published conference rulings by the Commission. In Conference Ruling No. 95 (g), issued June 30, 1908, the Commission says:

> The Commission will recognize any rail or water carrier filing a tariff, joint or local, with the Commission, as a carrier subject to the act so far as the issuance of passes to its officers and employees may be concerned. *Where a carrier has no tariffs on file with the Commission, and does not acknowledge itself subject to the Commission's jurisdiction, the Commission will regard the issuance of passes to its officers or employees as unlawful*, without, however, thereby passing upon the question of the jurisdiction of the act over such carrier in so far as it may be necessary to assert such jurisdiction. In this regard reference is made to *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co. et al.*, 13 I. C. C. Rep., 266, and *In re Petition Frank Parmelee Co.* (12 I. C. C. Rep., 46). By reference to these decisions it will be seen that *among the carriers not subject to the act are ocean carriers to nonadjacent foreign countries* and domestic carriers by wagon, stage, or automobile. *Carriers covered by these decisions are not eligible to file tariffs or receive passes.* (See Rulings 196, 216, 263, and 355.) [Italics ours.]

The following Conference Rulings of the Commission are to the same effect:

> 196. INTERCHANGE OF FREE TRANSPORTATION FOR EMPLOYEES OF WATER LINES.—When a common carrier by water, *other than an ocean carrier, not subject to the act,* unites with a carrier by rail for the interstate transportation of passengers, partly by water and partly by rail, under a common control, management, or arrangement for a continuous carriage shown by concurrence in tariff or tariffs duly published and filed with the Commission, such carriers can lawfully interchange transportation for their officers, agents, and employees. (Reaffirming Rule 95-g.) [Italics ours.]
>
> 216. FREE TRANSPORTATION OF OFFICERS OR EMPLOYEES OF OMNIBUS OR BAGGAGE EXPRESS COMPANIES.—In its decision on the petition of the Frank Parmelee Company, the Commission held that a carrier subject to the act can not lawfully give free transportation to officers, agents, or employees of an omnibus or baggage express company, except, as authorized in the act, for baggage agents who meet passenger trains at some point near the larger cities and go through the trains to arrange for transfer of passengers and their baggage. (See Ruling 95-a, par. 3, and 95-g.)

Thus, from the beginning the Interstate Commerce Commission has uniformly construed the expression "common carriers" as used in the exception to the Anti-Pass Provision, to mean common carriers *subject to the Act.* This was recognized by

the court below. (Rec. No. 493, p. 15; No. 494, p. 15.)

Second Point.

WITH THE COMMISSION'S CONSTRUCTION OF THE DISPUTED EXCEPTION BEFORE IT, CONGRESS, IN RE-ENACTING IN 1910 THE ANTI-PASS PROVISION, MADE NO CHANGE WHATEVER IN THE LANGUAGE OF THE EXCEPTION.

By the amendment of June 18, 1910, section 1 of the Act to Regulate Commerce was re-enacted and made applicable to telegraph, telephone, and cable companies (36 Stat., 544–545). In the section as thus re-enacted the exception to the Anti-Pass Provision permitting common carriers to interchange passes was retained without change in its language. This re-enactment of the exception occurred subsequent to the Commission's ruling in the *Parmelee Case, supra;* subsequent also to the Commission's report of that administrative construction to Congress in its *Annual Report for 1907* (pp. 27–28); and subsequent also to the published and widely circulated *Conference Rulings* quoted *supra* (pp. 9, 10).

It must be presumed, therefore, that Congress had knowledge of the prior uniform administrative construction of the exception by the Commission. *United States* v. *Falk*, 204 U. S. 143, 150, 152; *United States* v. *Hermanos y Compañia*, 209 U. S. 337, 339; *Valk* v. *United States and Rogue River Indians*, 28 Ct. Cl., 241, 245.)

Third Point.

THE CONSTRUCTION OF A STATUTE BY THE ADMINISTRATIVE BODY CHARGED WITH ITS ENFORCEMENT IS ALWAYS ENTITLED TO GREAT WEIGHT, AND WHEN, AS HERE, CONGRESS HAS RE-ENACTED THE STATUTE WITHOUT ALTERING THE PART CONSTRUED, THE ADMINISTRATIVE CONSTRUCTION, UNLESS PLAINLY ERRONEOUS, MUST BE TAKEN AS IMPLIEDLY RATIFIED BY CONGRESS, AND THEREFORE AS BINDING UPON THE COURTS.

The Interstate Commerce Commission is charged with the enforcement of the Act to Regulate Commerce and to that end has been invested with extraordinary administrative powers and also with powers which in certain aspects have long been recognized as quasi-judicial.

That great weight is always to be accorded the interpretation of a statute by the administrative body charged with its enforcement is a proposition too well settled to require extended discussion.

The principle is thus stated in *United States* v. *Philbrick*, 120 U. S., 52, 59:

> A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned.

Other statements of the principle are as follows:

> *United States* v. *Moore*, 95 U. S., 760, 763:
>
> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*,

12 Wheat. 210; *United States* v. *The State Bank of North Carolina,* 6 Pet. 29; *United States* v. *MacDaniel,* 7 id. 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

United States v. *Alabama Railroad Co.,* 142 U. S., 615, 621:

We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit.

United States v. *Hammers,* 221 U. S., 220, 228-229:

But, it may be granted that there is strength in the argument, and in that based on the words of the statute. They are, however, opposed by arguments of equal, if not greater strength. Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as *determining its meaning,* to the practice of the officers whose duty is was to construe and administer it. [Italics ours.]

Illinois Surety Co. v. *United States,* 215 Fed., 334, 338 (C. C. A. 4th Cir.):

It is familiar doctrine that the construction given to a statute by officials charged

> with its administration will be upheld by the courts unless convincing reason to the contrary is found in the language or purpose of the enactment. *New Haven R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S., 361, 401, 26 Sup. Ct. 272, 50 L. Ed. 515.

See also—

> *Boston & Maine R. R.* v. *Hooker,* 233 U. S., 97, 118;
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> *Jacobs* v. *Prichard,* 223 U. S., 200, 214;
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> *Schell's Executors* v. *Fauche,* 138 U. S., 562, 572;
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> *Interst. Com. Com.* v. *C. N. O. & T. P. R. Co.,* 64 Fed., 981, 982;
>
> *Greenwald* v. *Weir,* 130 App. Div. N. Y., 696, 701.

It is equally well settled that where, as here, subsequent to the administrative construction, Congress reenacted the provision without altering the part construed, the administrative construction, unless plainly erroneous, is binding upon the courts.

The rule in this regard was thus stated by this Court, speaking through the present Chief Justice in the *New Haven Case* (200 U. S., 361, 401):

> Now, without at all intimating that as an original question we would concur in the view expressed in the case last cited * * * we concede that the interpretation given by the Commission is those cases to the act to regulate commerce is now binding * * *. We make this concession, because we think we are constrained to so do, in consequence

of the familiar rule that *a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute.* [Italics ours.]

Other statements of the rule are as follows:

United States v. *Falk*, 204 U. S. 143, 150, 152:

> And the Attorney General's opinion cannot be overlooked. The proviso which he construed in section 50 of the act of 1890 was re-enacted in section 33 of the act of 1897.
>
> * * * * *
>
> This, then, is our view: the Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse.

United States v. *Hermanos y Compania*, 209 U. S. 337, 339:

> We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136. And we have decided that the reenactment by Congress without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S. 143, 152.

Valk v. *United States and Rogue River Indians*, 28 Ct. Cl. 241, 245:

> The jurisdictional act of 1891, March 3, chapter 538, which we are now considering, adopted the language of the act of 1885, to which it refers, and, in our opinion, Congress intended to use therein the words "citizens of the United States," in the sense that had been given by the Interior Department to the same words in the act of 1885 for the past six years, which, it must be presumed, was known to Congress.

See also—

United States v. *Baruch*, 223 U. S., 191, 199;

Latimer v. *United States*, 223 U. S., 501, 504;

Komada v. *United States*, 215 U. S., 392, 397;

Edwards v. *Darby*, 12 Wheat., 207, 210;

The presumption on which this rule is based is strengthened in the present instance by a consideration of the proviso inserted at the time of the re-enactment of section 1 (June 18, 1910). This proviso immediately follows the proviso in dispute permitting common carriers to interchange passes, and reads—

> *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for * * * employees * * * of such telegraph, telephone, and cable lines, and the * * * employees * * * of other common carriers *subject to the provisions of this act.* [Italics ours.]

The subject matter of both provisos is clearly *in pari materia* and there is no reason for limiting the interchange of passes by telegraph and telephone companies to other common carriers subject to the Act which does not apply with equal force to railroad companies. The reasonable explanation of the language of the provisos taken together would seem to be that, having ratified the restricted construction which the Commission had placed on the first proviso by re-enacting it without change, Congress made certain that the two provisos should be coextensive by expressly inserting the restrictive words in the second.

Moreover, the rule is peculiarly applicable where the administrative body is of the character of the Interstate Commerce Commission. " Especially do

we think this rule applicable to the case in hand," said the Chief Justice in the *New Haven Case,*" because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with." (p. 402.)

See also *Jacobs* v. *Prichard,* 223 U. S. 200, 214.

Fourth Point.

NOT ONLY IS THE COMMISSION'S CONSTRUCTION NOT PLAINLY ERRONEOUS BUT, ON THE CONTRARY, IT ACCORDS (1) WITH THE SENSE IN WHICH THE DISPUTED WORDS ARE GENERALLY USED IN THE STATUTE, (2) WITH THE CONTEXT OF THE PARTICULAR PROVISION, AND (3) WITH THE PURPOSE AND SPIRIT OF THE LEGISLATION.

1. THE COMMISSION'S CONSTRUCTION IS IN ACCORD WITH THE SENSE IN WHICH THE DISPUTED WORDS ARE GENERALLY USED IN THE STATUTE.

The words "carriers," "common carriers," "railroads," and "railroad companies" are used many times in the Act to Regulate Commerce, in the great majority of instances with the implied qualification, "subject to the provisions of this act."

Of course, in particular instances there may be a difference of opinion as to whether or not the qualification is implied, but accepting the enumeration in

the brief for the defendant in the Court below (pp. 39–40) it appears that—

(1) The expression "common carrier" is used at least 51 times in the sense of common carrier "subject to the provisions of this Act."

(2) The expression "railroad," "carrier by railroad," or "railroad company," is used 6 times with a like implied qualification.

(3) On the other hand, the expressions "common carrier" and "railroad company" together are used only 16 times without the implied qualification.

The following are typical instances where the qualification is necessarily implied, either from the context or the purpose of the legislation:

Section 1, paragraph 6, the Commodities Clause, provides that—

> From and after May first, nineteen hundred and eight, it shall be unlawful for *any railroad company* to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Section 1, paragraph 7, giving lateral branch lines the right to acquire switch connections, provides that—

> If *any common carrier* shall fail to install and operate any such switch or connection as aforesaid * * * the Commission may make an order * * * directing the common carrier to comply with the provisions of this section * * *.

In section 4, the last paragraph provides that—

> Whenever *a carrier by railroad* shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission * * *.

Section 5 provides—

> That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract * * * with any other common carrier or carriers for the pooling of freights of different and *competing railroads* or to divide between them the * * * proceeds of the earnings of such railroads * * *.

Clearly, the competing railroads are railroads subject to the Act, because the Act was not intended to prohibit pooling arrangements as to purely intrastate commerce.

In section 6, requiring publication of tariffs and adherence thereto, the word "carrier" meaning

"common carrier" is repeatedly used subject to the implied qualification, e. g.:

> *No carrier* * * * shall engage or participate in the transportation of passengers or property, * * * unless the rates, * * * have been filed and published * * *; nor shall *any carrier* charge * * * a greater or less or different compensation * * * than the rates, * * * which are specified; nor shall *any carrier* refund or remit * * * any portion of the rates * * * so specified, * * *: *Provided,* That wherever the word "carrier" occurs in this act it shall be held to mean "common carrier." (Seventh paragraph.)
>
> * * * and *carriers* shall adopt every means within their control to facilitate and expedite the military traffic * * *. (Eighth paragraph.)
>
> In case of failure or refusal on the part of *any carrier,* receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section * * *. (Tenth paragraph.)
>
> It shall be the duty of *every carrier by railroad* to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent * * * and in case *any carrier* shall fail at any time to have such name so posted in any station * * *. (Twelfth paragraph.)

In section 10, which provides penalties for inducing unjust discrimination, the last paragraph reads:

> If any such person * * * shall, by payment of money * * * or otherwise, * * * induce or attempt to induce any common carrier subject to the provisions of this act * * * to discriminate unjustly in his * * * favor * * * in the transportation of property, or shall aid or abet *any common carrier* in any such unjust discrimination, * * *.

In section 15, third paragraph, the Commission is given power to establish through routes and joint rates,

> * * * whenever *the carriers* themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates.

Section 15 also provides—

> That the shipper shall in all instances have the right to determine, where competing *lines of railroad* constitute portions of a through line or route, * * *. (Fourth paragraph.)

Section 16 (providing for reparation orders) contains many instances, among others the following:

> * * * the Commission shall make an order directing *the carrier* to pay to the complainant the sum to which he is entitled * * *. (First paragraph.)

> If *a carrier* does not comply with an order * * * the complainant * * * may file in the Circuit Court * * *. (Second paragraph.)
>
> Every order of the Commission shall be forthwith served upon the designated agent of *the carrier* * * *. (Fourth paragraph.)
>
> It shall be the duty of *every common carrier,* its agents and employees, to observe and comply with such orders * * *. (Sixth paragraph.)
>
> *Any carrier* * * * who knowingly fails or neglects to obey any order * * *. (Seventh paragraph.)

Section 20, seventh paragraph, imposes severe penalties upon—

> Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by *a carrier* * * * or fail to make full, true, and correct entries * * * appertaining to the *carrier's* business.

The so-called Carmack amendment, the last two paragraphs of section 20, nowhere employs the phrase "carrier subject to the provisions of this act"; but no other kind of carrier can be referred to by the expression "common carrier, railroad, or transportation company," repeatedly used.

2. THE COMMISSION'S CONSTRUCTION IS IN ACCORD WITH THE CONTEXT OF THE PARTICULAR PROVISION.

In *United States* v. *Chavez,* 228 U. S. 525, involving the construction of the words "to export"

as used in a Joint Resolution of Congress prohibiting the exportation of munitions of war under certain circumstances, this Court stated that the question

> may not be disposed of by any mere abstract consideration of the meaning of the words, but their signification must be determined with reference to the text of the Resolution itself. (p. 530.)

Proceeding, then, to examine the disputed words in the light of their context, the rules and principles stated in the following quotations from opinions of this Court are to be borne in mind:

> *Church of the Holy Trinity* v. *United States,* 143 U. S., 457, 459:
>
> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.
>
> *Brewer* v. *Blougher,* 14 Pet., 178, 198:
>
> It is, undoubtedly, the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it.
>
> *McKee* v. *United States,* 164 U. S., 287, 293:
>
> Under such circumstances it is not only the right but it is the plain duty of the court

to limit by a proper construction the otherwise boundless application of the general language used in the statute.

For convenience we repeat the proviso containing the exception in dispute:

> *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the * * * employees of *common carriers* and their families; nor to prohibit any *common carrier* from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

It is clear that the expression "any common carrier" in the second clause of the proviso of necessity designates carriers subject to the act, because only against such carriers is the prohibition directed, from which this clause carves out an exception. For like reason the expression "common carriers" in the first clause of the proviso—the very part in dispute—can only contemplate carriers subject to the act, so far as the giving of passes is concerned.

It is only reasonable to suppose that Congress intended the words to have the same meaning when applied to the recipient of the pass as when applied to the other party to the interchange, and further, that it intended them to have the same meaning in this instance that they have elsewhere in the same proviso.

Again, in the same provision, immediately after the language quoted above, the term " employees " is defined to include—

> persons who have become disabled or infirm in the service of *any such carrier* and the remains of a person killed in the employment of *a carrier.*

The words " any *such* carrier " are limited, by reference back to the preceding clause, to any carrier " subject to the provisions of this Act "; but clearly no distinction was intended between persons disabled in service and persons killed in service. Thus, here is another instance of the use in the Anti-Pass Provision of the word " carrier " with the implied qualification " subject to the provision of the Act."

In *Atkins* v. *The Disintegrating Company* (18 Wall., 272), this Court construed the eleventh section of the Judiciary Act of 1789, which gave the Federal circuit courts concurrent jurisdiction with State courts of " *all suits of a civil nature at common law or in equity.*" The section contained subsequent provisions that no person shall be arrested in one district for trial in another in any *civil action,* and that no *civil suit* shall be brought against an inhabitant of the United States by any original process, in any district of which he is not an inhabitant, or in which he is not actually found at the time of serving the writ. It was contended that a case in admiralty is a civil suit, and there-

fore within the meaning of the prohibition. This Court in denying the contention said (p. 301–302):

> It may be admitted that an admiralty case is *a civil suit* in the general sense of that phrase. But that is not the question before us. It is whether that is the meaning of the phrase as used in this section. The intention of the lawmaker constitutes the law. A thing may be within the letter of a statute and not within its meaning, or within its meaning though not within its letter. In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section—statutes or series of statutes *in pari materia.*
>
> The general language found in one place may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment.

In the present case the reasons are at least equally strong for assigning to the expression "*common carrier*" the restricted meaning it has elsewhere in the proviso.

See also:

Brown v. *Duchesne,* 19 How. 183, 194.
Pollard v. *Bailey,* 20 Wall. 520, 525–526.
Alexander v. *Alexandria,* 5 Cranch 1, 7.
United States v. *Freeman,* 3 How. 556, 564–565.
Lovell-McConnell Mfg. Co. v. *Automobile Supply Co.,* decided December 14, 1914.

8. THE COMMISSION'S CONSTRUCTION IS IN ACCORD WITH THE PURPOSE AND SPIRIT OF THE LEGISLATION.

The Anti-Pass Provision, like the other prohibitions in the Act to Regulate Commerce against favoritism, is primarily a remedial measure, and is entitled to that interpretation which best accords with its spirit and its purpose. As said by the present Chief Justice in the *New Haven Case* (200 U. S., 361, 391):

> It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

The Anti-Pass Provision was enacted to uproot a practice not only intolerably burdensome to the railroads and productive of injustice and discrimination, but corrupting and demoralizing to the community as well. Therefore, such exceptions as were made should be given, not a liberal construction, but the narrowest construction of which the words are capable. The spirit of the statute is not

one of easy toleration. It is a general condemnation subject only to such exceptions as can be indisputably established.

This view of the spirit and purpose of the provision is supported by previous decisions of this Court. In *L. & N. R. Co.* v. *Mottley* (219 U. S., 467), where a contract to issue free passes to Mottley and his wife annually during their lives, in consideration of the release of a claim for personal injuries, was held invalid, Mr. Justice Harlan said of the Anti-Pass Amendment (p. 478):

> It is said, however, that as the contract of Mottley and wife with the railroad company was originally valid, it cannot be supposed that Congress intended by the act of 1906 to annul or prevent its enforcement. *But the purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality, except in the cases of certain excepted classes to which Mottley and his wife did not belong* and which exceptions rested upon peculiar grounds. [Italics ours.]

See also, *American Express Co.* v. *United States,* 212 U. S., 522, 532–533.

The spirit and purpose of the Anti-Pass Amendment are made plainly apparent by its history and by the debates in Congress attending its passage. As originally enacted in 1887, the Act to Regulate Commerce did not expressly prohibit free passes. However, as already shown (*supra,* p. 2), the free transportation of persons, like the free transporta-

tion of freight, was held to be a violation of sections 2 and 3 prohibiting discrimination generally, both by the Commission and by the courts, at a very early date.

For a time the issue of passes greatly diminished. But in the *Party Rate Case* (145 U. S., 263, 278), it was suggested that the exceptions in section 22, permitting reduced rates and free passes in certain cases were "rather illustrative than exclusive." Partly because of this uncertainty in the application of the law, and partly because no appropriate penalty existed, the statute was never actively enforced, and the pass evil grew and flourished again. (40 Cong. Rec. 2096, 6947; 26 I. C. C. Rep., 491–492.)

Finally, the evil became so scandalous and so intolerable that even the railroads themselves went on record as desiring legislation against it, many of them favoring its total abolition. On this point the following testimony was given before the Industrial Commission by Mr. Paul Morton, then vice-president of the Atchison, Topeka & Santa Fe Railroad, and quoted in the Congressional Record (40 Cong. Rec. 2096):

> Passes are given for many reasons, almost all of which are bad ones. There should be no passes printed. Even railroad officials or employees traveling on other lines than those they work for should be required to pay fare. The chief reason that stimulates a man to ask a railroad company for a free pass is that somebody else has it. Passes

> are given for personal, political, and commercial reasons, and in exchange for advertising; for services and for various other reasons. I am in favor of the total abolition of railroad passes, and this view is held by a large number of the railroads of the country, as will be seen by the extract, quoted below, from the proceedings of a meeting of executive officers of western, northwestern, and southwestern railroads, held in October last in St. Louis. * * *

See also, the testimony of Mr. A. B. Stickney, president of the Chicago Great Western Railroad (40 Cong. Rec. 2096).

In connection with the political aspects of the evil urged in the debates, reference should be made to two recent reports of the Interstate Commerce Commission entitled *Montana Pass Situation* (29 I. C. C., 411), and *In re Financial Relations etc., of the Louisville & Nashville Railroad Co. and other carriers* (31 I. C. C., 261). In the latter case the Commission, after showing that the Louisville & Nashville Railroad Co. and the Nashville, Chattanooga & St. Louis Railway Co. together had issued in a single year to various persons—principally public officials—passes involving over 11,700,000 miles of travel—valued at $340,000—said (p. 264):

> There is scarcely a walk of life which is not represented in this procession of recipients of passes, from the Federal bench to the local politician and the sheriff who summons the jury. The threads represented by these passes tie thousands of citizens to the car-

> riers through improper relations. The lack of morality reflected by the facts here compiled is a menace to the institutions of a free people. * * * Men pledge their influence quietly in the home or school or club, in the professions, in business, in city councils, in administrative boards, in courts of justice, in legislative halls, and at the polls.

Many municipalities (New York and Boston, for example), are common carriers not subject to the Act to Regulate Commerce, maintaining ferries, street cars, etc. (*Davies* v. *Boston,* 190 Mass., 194; *Townsend* v. *Boston,* 187 Mass., 283); and there is a constantly increasing tendency toward municipal ownership. If the defendant's construction of the act prevails, the officers of common-carrier municipalities would be entitled to receive passes as well as the officers of other common carriers not subject to the Act, thus restoring under legal sanction one of the very evils at which the law was aimed.

Another evil particularly dwelt upon in the course of the debates was the enormous reduction of railroad revenues resulting from the issuance of passes. See especially the remarks of Senator La Follette (40 Cong. Rec. 9106) and of Senator Bailey (40 Cong. Rec. 9105–9106), and the testimony of John H. Reagan, sometime chairman of the House Committee on Interstate Commerce (40 Cong. Rec. 2096), and of Stuyvesant Fish, president of the Illinois Central Railroad (40 Cong. Rec. 2097). It is obviously unjust that the rest of the travelling public should be forced to pay for

the free transportation of pass-holders—who, as a class, are unusually well able to pay for themselves. This was recognized even in 1886, for one of the chief causes of complaint enumerated in the Cullom Report which led to the passage of the Act to Regulate Commerce, was:

> That a privileged class is created by the granting of passes and that the cost of passenger service is largely increased by the extent of this abuse. (Senate Rep. No. 46, 49th Cong., 1st Sess., p. 181.)

The serious drain upon the railroad revenues was shown by the testimony of Chairman Knapp of the Interstate Commerce Commission, to the effect that *from 20 to 25 percent of all the passenger traffic of the country was carried upon free passes* and that—

> If we could eliminate the free transportation and bring this public service down to the impartial conditions where every person who uses it pays his proper share, I believe the passenger rates throughout the country could be materially reduced and still the railroads have better returns from that branch of their service than they have at the present time * * * (40 Cong. Rec., 2097).

In view of these evils against which the Anti-Pass Amendment was directed, there is hardly room for argument as to which interpretation, the defendant's or the Interstate Commerce Commission's, best accords with its spirit and purpose.

The common carriers subject to the Act to Regulate Commerce are comparatively few in number, as compared with *all* common carriers both in this country and abroad. Their employees, as a whole, constitute the class of persons to whom the giving of passes would be attended by the least pernicious consequences. The regulation of the interchange between them would be—comparatively—a simple matter, confined within definite limits.

If, however, the defendant's contention prevails, and the words "common carriers" in the proviso be held to include *all* common carriers—*tap lines and other industrial railroads, street car lines, local traction companies, omnibus transfer companies and herdic lines, hackmen, boatmen, ferrymen, truckmen, lumber flumes, bucket lines for ore, parcel deliveries, district messenger services, carriers of all descriptions, both in this country and abroad*—not only would the difficulty of enforcing compliance with the statute be almost insurmountable, but the vast multitude of officers, agents and employees and employees' families—many millions at the lowest reckoning—thus brought within the proviso would largely defeat the purpose of the legislation.

Almost anyone whom the railroads desired to favor, or who desired to wring favors from the railroads, could bring himself within this definition. As shown in the *L. & N. Investigation* (31 I. C. C., 261), and in other reports of the Interstate Commerce Commission, *infra*, conditions even now are

bad enough, though it is only fair to presume that they have been thus far held in check by the Commission's well-known administrative construction of the law, which, generally speaking, has been acquiesced in by the railroads. But if the Commission's construction of the law be now judicially overruled, there is every reason to fear that such abuses will be indefinitely extended.

The testimony of Mr. Stickney (40 Cong. 2096), the Report of the Cooley Commission (40 Cong. Rec. 2097), and the conditions unearthed in the recent *Colorado Free Pass Investigation* (26 I. C. C., 491)—part of a much wider investigation still going on—show clearly how the railroads are virtually coerced by large shippers and by persons of influence, political or otherwise, into the giving of free passes wherever they have even a colorable right to do so. The same situation was disclosed in the *Tap Line Cases* (23 I. C. C., 277, 290, 298), where many of these industrial railroads were shown to be technically common carriers, though practically all their traffic was furnished by their proprietary lumber companies. It is a notorious fact that similar industrial lines are found everywhere throughout the country in connection with large mining and manufacturing concerns. In case the defendant's contention prevails, there is no doubt that these industrial lines would be in a position to demand passes for their officers and employees, who are generally officers and employees of the proprietary industry as well—the Commodities

Clause being inapplicable to carriers not subject to the Act to Regulate Commerce.

The serious drain upon railroad revenues due to the pass system, even under present conditions, was pointed out by the Commission in the *Colorado Free Pass Investigation* (26 I. C. C., 491), and also in the recent *Five Percent Increase Case* (31 I. C. C. 351, 410). In the latter instance the Commission stated (p. 410), that during the first 11 months of the year 1913 the 78 railroads in official classification territory (North of the Ohio River and East of the Mississippi) had issued over 600,000 annual passes, in addition to over 400,000 short-term passes, and several millions of passes for single trips. The one-trip passes alone represented approximately 1,000,000,000 passenger miles and many millions of dollars in passenger revenue. In short, the Commission found that,—

> If to trip passes is added the travel on annual and term passes it will perhaps be found that the travel on passes *exceeds ten per cent of the total passenger travel* in official classification territory. (31 I. C. C., 410.)

In Utah and Colorado, as appeared in the *Colorado Free Pass Investigation* (26 I. C. C., 502, 503), the proportion of travel on free passes was much greater than in official classification territory.

Nevertheless, with some show of seriousness, it was argued below by the defendant that no reduction in revenue would result from giving passes to employees of common carriers not subject to the Act, because such passes are "*interchanged*"

among the carriers, the inference being that these interchanges are mere substitutes for cash expenditures otherwise inevitable. Such a contention may be true in occasional instances, but as applied generally it is palpably groundless. Every one knows that the amount of travel under the pass system is enormously greater than it would be if no passes were issued. Every one knows too that passes are not given exclusively for use upon the business of the carrier to whose employees they are issued, nor are they so used in fact. Neither are they given upon a *quid pro quo* basis, mileage for mileage, or value for value. The defendant would be the last to concede that they must be so given. And particularly as to the swarm of little carriers not subject to the act (industrial lines, etc.), the interchange of passes would be, to use a homely illustration, an " interchange " of Christmas presents with the trunk line railroads playing the rôle of *pater familias.*

Furthermore, it is a notorious fact that the railroads themselves consider such transportation, not as compensated, but as gratuitous, and for that reason make the passes conditional upon releasing the carrier from liability in case of accident. (*Charleston etc. Ry. Co.* v. *Thompson,* 234 U. S., 576, 578; *Northern Pacific Ry. Co.* v. *Adams,* 192 U. S., 440; *American Express Co.* v. *United States,* 212 U. S., 522, 524, 532.) The answers concede that the passes in the present case were so conditioned (Rec. No. 493, p. 11; Rec. No. 494, p. 11).

How completely the spirit and purpose of the Anti-Pass Amendment were misconceived by the court below is evident from the statement in its opinion that the exceptions were inserted to permit the railroads to continue as before *"to curry favor with persons having business to place"* (Rec. No. 493, p. 18). An examination of the exceptions in connection with the debates in Congress, however, will show that in every instance they "rest upon peculiar grounds" (*Mottley Case,* 219 U. S., at 478),—having either some charitable object or some other obvious common-sense purpose wholly unconnected with the purchase of traffic or influence. This is particularly true of the exception in favor of employees, which was not contained in the original draft of the amendment, and which, as the debates clearly show, was only inserted at the request of the employees themselves and principally for their benefit (40 Cong. Rec. 6667–6669), though, it was further recognized that it would also tend to promote a desirable spirit of cooperation between them and their immediate employers (40 Cong. Rec., 6668).

As stated by the Interstate Commerce Commission itself in its Third Annual Report, page 12:

> It is obvious, that for many forcible reasons, the most amicable relations should exist between the railroad companies and their employees, and that the latter should feel that the companies are disposed in all proper ways to manifest an interest in their general welfare. The compensation of these em-

> ployes is low, the service exacting and often hazardous, their opportunities to give attention to domestic affairs are very limited, and as a rule they are dependent almost entirely on their compensation for the support of their families. It is clearly for the interest of these employes to reside at points on their roads convenient to their business, where homesteads can be acquired and cost of rents and living expenses are moderate. Such locations may often be some distance from points required to be frequently reached by members of their families, such as schools and markets, and it would seem reasonable, and no more than an equitable part of their compensation, for the company to carry the wives and children of its employes free, or at low rates, *for fairly necessary purposes.* Provision, it would seem, might very properly be made to permit this to be done. [Italics ours.]

It is not " fairly necessary " to the accomplishment of this purpose, however, nor could it have been intended by Congress, that railroad employees and their families should be given trips to Europe or tours about the world at the expense of the rest of the travelling public. There are reasonable limits even to this justification and the Government contends that those limits were properly established by the Commission's administrative construction restricting the interchange of passes to carriers subject to the Act to Regulate Commerce.

Fifth Point.

THE EXCEPTION CONTAINED IN SECTION 22 CAN HAVE NO BROADER OPERATION THAN THE EXCEPTION CONTAINED IN THE ANTI-PASS PROVISION OF SECTION 1.

Section 22 of the Act to Regulate Commerce, as originally enacted, provides:

> * * * nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other *railroad companies* for their officers and employees; * * *. [Italics ours.]

Each of the reasons urged by the Government for construing the words "common carriers" in section 1 to mean "common carriers subject to this act" applies with equal force to the words "*railroad companies*" in section 22, namely: the remedial character of the statute; the latent ambiguity in the use of the words "railroads," "railroad companies," "common carriers" and like expressions; the established administrative practice resolving this latent ambiguity in favor of a strict construction of all exceptions to the general rule against discrimination; the ratification of this administrative practice through the amendment of 1910; and, finally, the reasons of policy which require the narrowest possible construction of the exceptions to prevent

the restoration of the very conditions which the statute was enacted to uproot.

But even if section 22 would have been given a broader construction prior to 1906 (which, even for argument, is not admitted), no broader construction can be given it to-day. The policy of the United States in regard to passes received complete expression in the Anti-Pass Amendment to section 1 passed in 1906. In so far as this remnant of the older days still left in section 22 conflicts with that policy, that section must now be regarded as repealed in accord with the familiar principle of law laid down in *United States* v. *Tynen*, 11 Wall., 88, 92, as follows:

> There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and *even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.* [Italics ours.]

Again, in *Murdock* v. *City of Memphis* (20 Wall., 590, 617), Mr. Justice Miller said:

> A careful comparison of these two sections (set forth in parallel columns, *supra,* pp. 592, 593.—Rep.) can leave no doubt that it was the *intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject.* We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. [Italics ours.]

Accord:

District of Columbia v. *Hutton,* 143 U. S., 18, 26;

Tracey v. *Tuffley,* 134 U. S., 206, 223;

Cook County National Bank v. *United States,* 107 U. S., 445, 451;

King v. *Cornell,* 106 U. S., 395, 396;

Alexander v. *Alexandria,* 9 Cranch., 1, 7.

And this seems to have been the view taken in the debates attending the Anti-Pass Amendment as to its effect on section 22. See in 40 Cong. Rec., the speeches of Senator Culberson, p. 6932, 6933;

Senator Knox, p. 7987; Senator La Follette, p. 7993; and Senator Clay, p. 7993.

CONCLUSION.

The decrees should be reversed and the causes remanded with instructions to award the injunctions.

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THURLOW M. GORDON,
Special Assistant to the Attorney General.

DECEMBER, 1914.

○

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

UNITED STATES OF AMERICA, APPELLANT.

v.

ERIE RAILROAD COMPANY, APPELLEE.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
Counsel for the Interstate Commerce Commission.

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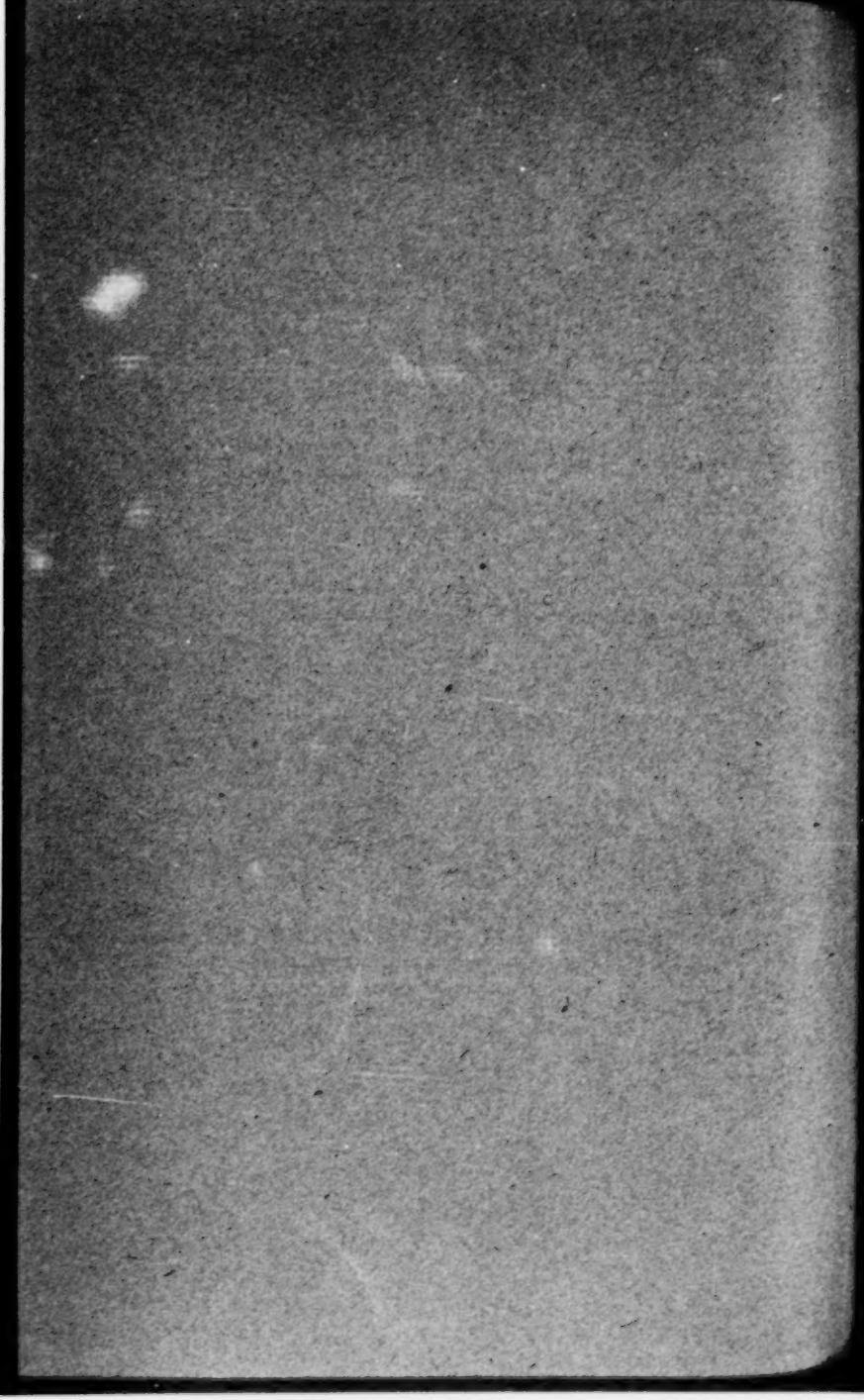

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, appellant, *v.* ERIE RAILROAD COMPANY, appellee.	Nos. 493 and 494.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

These suits were brought by the United States attorney for the Southern District of New York at the direction of the Attorney General of the United States, in accordance with the provisions of section 3 of the act to regulate commerce, approved February 19, 1903, commonly known as the Elkins Act. In the first action the Government sought to restrain the Erie Railroad Co. from issuing passes and furnishing free transportation thereon to the officers, agents, and employees of common carriers not subject to the act to regulate commerce. It is admitted that the Erie Railroad was and is furnishing free transportation to carriers not subject to the act. In the second suit the Government sought to enjoin the Erie Railroad Co.

from issuing a pass to a Mr. Ketchum, the American agent of the Great Eastern Railway of England, which is a common carrier partly by rail and partly by water, in a nonadjacent foreign country, and which is not subject to the act to regulate commerce. Unless his employment by the Great Eastern Railway of England was sufficient legal justification for the giving of a pass to Mr. Ketchum, it is conceded that no other justification exists. The Erie Railroad Co. admittedly has pursued, and announces its intention of pursuing, the practice of interchanging passes with various trans-Atlantic steamship companies for the free transportation of certain of their officials and employees over the interstate lines of the Erie Railroad Co. The trans-Atlantic steamship companies, it is conceded, are not subject to the act to regulate commerce.

The question, therefore, for determination in these cases, is whether under sections 1 and 22 of the act to regulate commerce, as amended, passes may be exchanged by common carriers, which are subject to the act to regulate commerce, with the officers, agents, and employees of common carriers which are *not* subject to the act to regulate commerce.

The provisions of the act to regulate commerce involved particularly in this litigation are contained in the following excerpts from said act:

> SEC. 1. That the provisions of this act shall apply * * * to any common carrier or carriers engaged in the transporta-

> tion of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), *from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States* or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. * * *

It is our contention that the common carriers mentioned in the various sections of the act under consideration are the common carriers described in section 1 engaged in the transportation of persons and property from one State or Territory of the United States to any other State or Territory of the United States, etc., and that a common carrier not subject to the act was not in contemplation in the words "common carrier" as here used in the act to regulate commerce; in other words, the act to regulate commerce in its references to common carriers with respect to interchange of transportation manifestly means common carriers subject to the act, and common carriers not subject to the act can not be reasonably construed to be within the meaning of the words "common carrier" referred to in the free-pass sections of the act.

The free-pass provision of the act to regulate commerce is contained in section 1, and reads as follows:

> No common carrier *subject to the provisions of this act* shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National homes or State homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common

carrier is interested, persons injured in wrecks, and physicians and nurses attending such persons: *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further,* That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers subject to the provisions of this act: *Provided further,* That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed and the widows during widowhood, and minor children during minority of persons who die while in the service of any such common carrier. Any

common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty.

Section 22 of the act to regulate commerce reads as follows:

That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national homes or State homes for disabled volunteer soldiers and of soldiers and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this

act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided,* That no pending litigation shall in any way be affected by this act: *Provided further,* That nothing in this act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier subject to the provisions of this act shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Inter-

> state Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso.

The lower court held that under the provisions of the act to regulate commerce above set out the Erie Railroad Co., a common carrier subject to the act, could exchange free transportation with any common carrier anywhere although not subject to the act. Thereupon the case was brought to this court on appeal by the Government.

ARGUMENT.

I.

The United States District Court has jurisdiction to restrain by injunction the unlawful issuance of passes.

A proceeding to enjoin the carriage of passengers at less than the published rates, or to enjoin any other discrimination forbidden by the act to regu-

late commerce, is provided for by the Elkins Act in section 3, which authorizes the United States attorney, at the direction of the Attorney General, to institute and prosecute such proceedings in the Circuit Court. The Commerce Court act gave to the Commerce Court jurisdiction over such cases as by section 3 of the Elkins Act were authorized to be maintained in the Circuit Court. (*United States* v. *Union Stock Yard,* 226 U. S., 286.) By the act making appropriations to supply urgent deficiencies, approved October 22, 1913, the Commerce Court was abolished, and jurisdiction theretofore vested in the Commerce Court was transferred and vested in the several district courts of the United States.

The issuance of franks by express companies was enjoined as being unlawful. *American Express Co.* v. *United States,* 212 U. S., 522.

(*a*) The issuance of free passes, being an unjust discrimination, was included within the general prohibition of sections 2 and 3 of the act to regulate commerce even before the prohibition now included in section 1 of the act was inserted by the amendment of June 29, 1906. (In re Charge to the Grand Jury, 66 Fed., 146; Ex parte Koehler, 30 Fed., 867; In re Carriage of Persons Free, 3 I. C. R., 717; *Slater* v. *Northern Pacific Ry. Co.,* 2. I. C. C., 243; *Harvey* v. *L. & N. R. R. Co.,* 3 I. C. R., 793; *Producers' Ass'n* v. *D., L. & W. R. R. Co.,* 7 I. C. C., 92.)

(*b*) It was also a carrying of passengers for less than the published rates within the meaning of sec-

tion 3 of the Elkins Act. The jurisdiction of the court to enjoin such violations of the law is clear, and was exercised in an analogous case referred to above—*American Express Co.* v. *United States,* 212 U. S., 522.

II.

The proviso in section 1 of the act to regulate commerce permitting the issuance of passes to employees of common carriers includes only employees of common carriers subject to the act to regulate commerce.

(*a*) The railroad common carriers mentioned in the various sections of the act are the railroad common carriers described in section 1 engaged in the transportation of persons and property from one State or Territory of the United States to any other State or Territory of the United States. The first paragraph of the first section limits the various provisions of the act with respect to railroad common carriers to those engaged in the interstate traffic therein specified. A common carrier such as an omnibus line or dray line, doing a local business, or an ocean steamship line, or a railroad in England, Germany, or France, was plainly not in contemplation by Congress as being embraced in the words " common carrier " used in the act to regulate commerce. The act in all of its references to common carriers manifestly means common carriers subject to the act, and common carriers in other portions of the world, or stage lines, omnibus lines, and the like, can not reason-

ably be construed to be within the meaning of the words " common carrier " referred to in the different sections of the act.

(*b*) The original act to regulate commerce contained no express prohibition of free passes. It did, however, contain in sections 2 and 3 a prohibition against discrimination in general which would include free passes. It also contained in section 22 certain exceptions allowing reduced rates, free carriage, and " exchanging passes or tickets " in certain instances. The Interstate Commerce Commission, as will be shown later on in this brief, construed sections 2 and 3 as prohibiting free passes in general, but there was no penalty attached, and its prohibitions were found to be ineffective to suppress the pass evil which grew to scandalous proportions. Thereupon in 1906 an amendment was passed, which is now a part of section 1, prohibiting any common carrier subject to the provisions of the act from issuing or giving any interstate free pass, with certain exceptions, and Congress fixed a penalty for violation of this section as follows:

> Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty.

The words "common carrier" in this penal clause, of course, mean common carriers subject to the act, for manifestly common carriers not subject to the act could not be guilty of any violation of the act; so that all common carriers were prohibited from issuing passes, with certain exceptions, and any common carrier issuing a pass other than to those expressly excepted from the act would be guilty of a misdemeanor. The prohibition against common carriers issuing passes, certainly could have no application other than to common carriers subject to the act, and common carriers made guilty of a misdemeanor for violating the act naturally were common carriers subject to the act. Bearing in mind that the common carriers discussed in the prohibitory and penal clauses were necessarily common carriers subject to the act, let us consider the proviso which reads as follows:

> *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

The purpose of this proviso was plainly to carve out exceptions from the foregoing portions of the act prohibiting common carriers from issuing passes. It was not the purpose of the proviso to make a distinction between common carriers subject to the act and those not subject to the act. "A

proviso will be construed consistently with the legislation under consideration." (*American Express Co.* v. *United States*, 212 U. S., 523.)

That it was not the intention of Congress to divide common carriers into two classes—one subject and the other not subject to the act—by section 1 is evidenced when the proviso is read in connection with the first part of the section, thus:

> No common carrier *subject to the provisions of this act* shall * * * directly or indirectly, issue or give any interstate free ticket or free pass * * * *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families * * *.

It was unnecessary to repeat the expression "subject to the provisions of this act," used in the first sentence, for only common carriers *subject to the act* were under discussion, and it would, indeed, be a strange construction to say that the words "common carrier" mean one thing in the beginning of the sentence and something else in the proviso. A proviso is to be construed strictly, and its office is not to add new matter to the main clause, but rather to modify its application by carving out certain exceptions to which the main clause shall not apply. It will not be deemed from doubtful words to be intended to enlarge or extend the act or provision on which it is engrafted. (*In re Webb*, 24 How., Pr. 247, 249; *Ryan* v. *Carter*, 93

U. S., 78.) That it was so used in this instance appears, we think, conclusively established by an examination of the language itself, and that the word "such" is understood before the words "common carriers"—

> *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of (such) common carriers, and their families. * * *

That this was the intention of Congress is evidenced not only by the language used, but in the discussion of this very matter on the floor of the Senate, when the amendment was under consideration, Senator Spooner said (40 Cong. Rec., p. 7922):

> Why should not railroad corporations, common carriers in interstate commerce, be permitted to exchange free transportation with the officers of other companies, and their families, and the employees of other *such* carriers, and their families? It has always been done.

"Such," as used by Senator Spooner, referred to common carriers subject to the act, and the idea expressed was that common carriers subject to the act should be permitted to exchange free transportation with other common carriers subject to the act. In all of the congressional debates when this amendment was pending (40 Cong. Rec., p. 7922) not once was the suggestion made that the proviso allowing interchange of passes among carriers

meant common carriers other than those subject to the act. Certainly the legislators had no thought of allowing common carriers subject to the act to exchange passes with carriers of all descriptions, everywhere and anywhere, including municipal corporations which maintain and operate the facilities of common carriers.

(*c*) It is to be noted that the proviso in section 1 uses the expression "*interchange* of passes for the officers, agents, and employees of common carriers." *Interchange* and *exchange* are not synonymous terms; they have different meanings and signify different kinds of transactions. *Interchange* is the more intimate term, signifying mutuality, equality, and reciprocal relations between those similarly circumstanced, involving no difference in value in the things interchanged. *Among ourselves*—a kind of family affair, applying to those who are subject to the same laws and the same duties. *Interchange* is a much narrower term than *exchange*. Common carriers subject to the act to regulate commerce may *interchange* passes, but there can be no *interchange* of passes between a common carrier subject to the act and a common carrier of another class; that is, a common carrier not subject to the act. Between common carriers of different and distinct classes of this nature the word *interchange* would be inapplicable, and the word *exchange* descriptive of the transaction. The term *interchange* of passes, therefore, was used advisedly, applying to those persons precisely simi-

larly situated—officers, agents, and employees of common carriers subject to the act. This conclusion is emphasized upon examination of the proviso immediately following the proviso in question, which permits the *exchange* of passes and franks:

> *And provided further,* That this provision shall not be construed to prohibit the privilege of passes or franks, or the *exchange* thereof with each other * * * for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers *subject to the provisions of this act.*

The first proviso is regarding the *interchange* of passes among carriers under like circumstances and conditions; that is, subject to the act. The second proviso is regarding the *exchange* of passes and franks between telegraph, telephone, and cable companies, which are subject to the act, and other common carriers subject to the act. To prevent any possible construction of the words "other common carriers," including common carriers not subject to the act, the words "subject to the provisions of this act" are added. Here the swapping of passes and franks is referred to as an *exchange,* they not being of the same class, as the pass covers the transportation of persons, and franks the transportation of property or transfer of messages. The exchange is between different classes of common carriers—railroads, on the one hand, and telegraph, telephone, and cable companies on the other. So if

the framers of the first proviso had intended it to cover common carriers not subject to the act, the word " exchange " would have been used; but by employing the word " interchange " a clear interpretation must be that the common carriers are of the same class—both subject to the act to regulate commerce.

This view finds further support in the second paragraph of section 3 of the act, which provides that—

> every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the *interchange* of traffic between their respective lines. * * *

Here is a clear demonstration of the meaning of the word *interchange,* which expresses the mutual, intimate, and reciprocal relations existing among carriers subject to the act. In section 1, at the conclusion of the second paragraph, we find the carriers authorized—

> to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars. * * *

The words *exchange* and *interchange* have different significations; otherwise both words would not have been used. Then, again, in the concluding part of the third paragraph of the first section:

> * * * nothing in this act shall be construed to prevent telephone, telegraph, and

> cable companies from entering into contracts with common carriers for the *exchange* of services.

Here "*exchange*" is used because transportation of persons and property is exchanged for the transmission of messages between two distinct classes of common carriers; that is, railroads as one class, and telephone, telegraph, and cable companies as another class. So with regard to the provision for the issuance of the *interchangeable* 5,000-mile tickets (sec. 22), which carries with it the idea of interchange of such tickets among *carriers subject to the act.*

The exact language of section 22 in this respect is—

> * * * But before any common carrier subject to the provisions of this act shall issue any such joint interchangeable mileage with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section 6 of this act. * * *

The Interstate Commerce Commission has jurisdiction over common carriers subject to the act, and, of course, no jurisdiction over common carriers not subject to the act. The interchange of passes between common carriers subject to the act

is subject to the supervision and visitatorial power of the Commission. The Commission, as the visitor of carriers subject to the act, may be fully advised as to what passes are issued by them, and to whom, and it is in a position to prosecute any departure from the act to regulate commerce and to report to Congress any abuse of the exceptions to the act. A construction of the proviso permitting the exchange of passes with the common carriers not subject to the act would destroy the supervisory power of the Commission over the issuance of passes to this extent. It was, we think, not within the contemplation of Congress that the words "common carrier" in the proviso in section 1 should be construed to include common carriers not subject to the act and thus beyond the jurisdiction of the Interstate Commerce Commission. We submit, therefore, that the words "common carrier" in the proviso are limited by the description of the particular common carriers covered by the section in the main clause; that is, "common carriers subject to the provisions of this act."

III.

The evil aimed at in section 1 was the pass system—the giving to those to whom they were granted special privilege of free transportation at the burden of those who pay their transportation taxes. The exceptions must, therefore, be strictly construed, and not extended beyond those definitely included by the language of the section.

(*a*) There can no more be free railroad transportation than there can be free taxes. An in-

dividual may, by special warrant of law from those having authority, escape payment for transportation of his person or property, but that transportation costs something, which some one has to pay. The greater the number to whom passes are issued, based upon their use of transportation facilities, the greater the burden upon those who are forced to pay. The exemptions, therefore, from payment of these transportation taxes must be strictly construed, and unless the intent of Congress is plainly apparent to give such exemptions to the multitude of agents and employees of the innumerable common carriers of this and other countries not subject to the act, and thereby place an additional burden upon those who pay such transportation taxes, such a construction will not be placed upon the act. Such a construction would violate the spirit of the act and destroy a large part of its salutary purpose of distributing the burden of transportation taxes equally and equitably among the users of transportation facilities. It would permit railroads to purchase traffic by the use of the pass. It is a matter of common knowledge that the pass evil grew and flourished prior to 1906. The antipass amendment was inserted in the act in 1906 as a remedy for the well-known abuses arising from the issuance of passes, and the purpose of Congress is so clear that in the case of *L. & N. R. R. Co.* v. *Mottley* (219 U. S., 486), Mr. Justice Harlan, in

writing the opinion of the Supreme Court, said, concerning the 1906 amendment (p. 478):

> But the purpose of Congress was to cut up by the roots every form of discrimination, favoritism, and inequality, except in the cases of certain excepted classes to which Mottley and his wife did not belong. * * *

One of the main purposes of the act to regulate commerce was to put an end to passes, discriminations, and favoritisms which had grown up in the practice of interstate carriers; and the issuance of passes except to certain recognized persons other than the employees of the issuing carrier had long been recognized as a grave wrong and an unjust burden upon the transportation-tax paying public.

IV.

The Interstate Commerce Commission has uniformly held that the proviso in question applies only to common carriers subject to the act. This construction by those having the enforcement of the act in charge should be received with great weight.

This question was directly passed upon by the Interstate Commerce Commission in the matter of the Frank Parmelee Co. (12 I. C. C., 39, 47), the Parmelee Co. being an incorporated transfer company of Chicago, Ill., carrying passengers and baggage between railroad stations, hotels, and private residences by means of omnibuses and express wagons. The Frank Parmelee Co. maintained that it had the right, under section 1 of the act to regu-

late commerce, to participate in the exchange of free transportation with other common carriers, including railroads, and it asked the Commission for an administrative ruling to this effect. The Commission held that the Parmelee Co., though a common carrier, was not a common carrier subject to the act, and was, therefore, not entitled to interchange of passes with common carriers subject to the act under section 1. The Commission said (12 I. C. C., 45):

> The first part of that paragraph of the law relates in terms only to common carriers that are subject to the provisions of the act. It is contended by counsel that the proviso deals with all common carriers, whether subject to the provisions of the act or not, and permits them to issue free transportation, at their pleasure, to their own employees and to the employees of all other common carriers, including those not subject to the act. In our judgment this was not the intention of the lawmakers. The purpose of the proviso was not to make a distinction between common carriers that are subject to the act and those that are not. Its purpose was to bring into contrast the right of common carriers subject to the act to give free transportation to their own employees and their right, by way of interchange, to give free passes to the employees of other common carriers subject to the act. Its purpose was to modify the general inhibition against the giving of passes by a common carrier

> subject to the act except to its own employees by making a special exception of the giving of passes, by way of interchange, to the employees of any other common carrier subject to the act.

This holding has been steadfastly adhered to by the Commission in many cases, and has been several times reaffirmed in the conference rulings of the Commission. In Conference Ruling No. 95(g), issued June 30, 1908, the Commission said:

> The Commission will recognize any rail or water carrier filing a tariff, joint or local, with the Commission, as a carrier subject to the act so far as the issuance of passes to its officers and employees may be concerned. Where a carrier has no tariffs on file with the Commission, and does not acknowledge itself subject to the Commission's jurisdiction, the Commission will regard the issuance of passes to its officers or employees as unlawful, without, however, thereby passing upon the question of the jurisdiction of the act over such carrier in so far as it may be necessary to assert such jurisdiction. In this regard reference is made to *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co. et al.* (1. C. C. Rep., 266), and *In re Petition Frank Parmelee Co.* (12 I. C. C. Rep., 46). By reference to these decisions it will be seen that among the carriers not subject to the act are ocean carriers to nonadjacent foreign countries and domestic carriers by wagon, stage, or auto-

mobile. Carriers covered by these decisions are not eligible to file tariffs or receive passes. (See Rulings 196, 216, 263, and 355.)

The following Conference Rulings of the Commission are to like effect:

196. INTERCHANGE OF FREE TRANSPORTATION FOR EMPLOYEES OF WATER LINES.—When a common carrier by water, other than an ocean carrier not subject to the act, unites with a carrier by rail for the interstate transportation of passengers, partly by water and partly by rail, under a common control, management, or arrangement for a continuous carriage shown by concurrence in tariff or tariffs duly published and filed with the Commission, such carriers can lawfully interchange transportation for their officers, agents, and employees. (Reaffirming Ruling 95–g.)

216. FREE TRANSPORTATION OF OFFICERS OR EMPLOYEES OF OMNIBUS OR BAGGAGE EXPRESS COMPANIES.—In its decision on the petition of the Frank Parmelee Co., the Commission held that a carrier subject to the act can not lawfully give free transportation to officers, agents, or employees of an omnibus or baggage express company, except, as authorized in the act, for baggage agents who meet passenger trains at some point near the larger cities and go through the trains to arrange for transfer of passengers and their baggage. (See Ruling 95–a, par. 3, and 95–g.)

In *Wylie* v. *Northern P. Ry. Co.* (11 I. C. C., 145) the Yellowstone National Park Transportation Co., operating a line of stage coaches through the Yellowstone Park, sought to establish through routes and joint rates with the Northern Pacific Railroad Co. On these facts the Commission held that the railroad company and the transportation company were not competent, under section 6 of the act, to form through routes and establish joint rates, because the stage-coach company was not a common carrier subject to the provisions of the act.

(*a*) These holdings of the Commission agree with the purposes of Congress expressed in the act and best serve the remedial features of the legislation, and, unless there is some controlling reason to the contrary, should be accepted by the courts. (*Ill. Cent. R. R. Co.* v. *Interstate Com. Com.*, 206 U. S., 441.) These constructions of the Commission have been reaffirmed over and over again by the Commission during many years, and they have been left undisturbed by Congress and should not now be disturbed by the courts. The decision of the Commission in the Parmelee case in 1907, and its rulings interpreting the proviso in section 1 as giving authority for a common carrier to interchange passes only with other common carriers subject to the act were given wide publicity. If these decisions of the Commission had not been in accord with the purpose and intention of Congress as ex-

pressed in section 1 of the act, and in the proviso in question, is it reasonable to suppose that Congress would have allowed the construction of the Commission to go unchallenged? Is not the fact that Congress has left the findings of the Commission as to the meaning of the proviso undisturbed persuasive, at least, that the findings of the Commission were in accord with the congressional intention?

The Conference Rulings and decisions of the Interstate Commerce Commission as to the construction to be placed upon the clause in controversy should be accorded great weight. In *Tift* v. *Southern Ry. Co.* (138 Fed., 757, affirmed 158 Fed., 1021) the court said:

> Explicit law, the settled policy of the Government, the practical principles of reason and justice require that, save for controlling reasons of law or fact, the national courts should not discredit or disparage the conclusions of the Interstate Commerce Commission.

So in *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry. Co.* (64 Fed., 981), it is said:

> The Interstate Commerce Commission is not a court, but an administrative body. * * * Its rulings and decisions are entitled to the highest respect of the Federal courts, and they are justly so regarded.

This court, speaking through the present Chief Justice in the *New Haven case* (200 U. S., 361, 401) said:

> * * * we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding * * *. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that *a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute.* [Italics ours.]

In *United States* v. *Philbrick,* 120 U. S., 52, 59, this court declared:

> A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned.

The following case is in point:

> *United States* v. *Moore,* 95 U. S., 760, 763: The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby,*

12 Wheat., 210; *United States* v. *The State Bank of North Carolina,* 6 Pet., 29; *United States* v. *MacDaniel,* 7 id., 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

Congress having conferred upon the Interstate Commerce Commission jurisdiction over common carriers doing an interstate business or with an adjacent foreign country, the contemplation of Congress in the entire act to regulate commerce had to do only with common carriers which by the act were made subject to the authority of the Interstate Commerce Commission. Section 1, for instance, makes it a misdemeanor for any common carrier to violate the free-pass provision. Manifestly such carriers as are not subject to the act could not legally offend any of its requirements. They could not be held guilty of a misdemeanor or be subject to the penalties imposed by its provisions. How can it be fairly contended that the common carriers mentioned in the proviso include those not subject to the act as well as those subject to the act, while the penal clause, of necessity, can apply only to those common carriers subject to the act? Why should Congress have been so solicitous about common carriers not subject to the act as to give them the privilege of interchange of free transportation, particularly when it is considered that such solicitude, had it been intended, would have largely frus-

trated the very reason for the amendment of 1906 relating to the issuance of free passes? It is a necessary sequence that, should the contention of the Erie Railroad Co. prevail, passes may be *interchanged* with all the persons who may be agents and employees of any and all common carriers. No words or limitation or qualification may be inserted or read into the act, but passes could be, under respondent's contention, lawfully issued to an innumerable horde of agents and employees of common carriers, big and little, not subject to the act, as well as to agents and employees of German, French, English, Egyptian railroads, and common carriers operating in any or every part of the wide world. Could Congress have intended anything of the kind? We think not; and the language used by Congress is not susceptible of any such interpretation. The free-pass provision should be construed so as not to vitiate the purpose leading to its enactment. In *New York, New Haven & Hartford Railroad Co.* v. *Interstate Commerce Commission* (200 U. S., 361–391) the Supreme Court said:

> It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism * * * by forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was

> remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer.

To construe the proviso to permit passes to be issued to the agents and employees of any common carrier anywhere, would work an injustice to the American transportation-tax paying public that would have to bear the burden of paying the cost of operating the transportation systems. It is well settled that statutes should receive a sensible construction, such as will effectuate the legislative intention, and such construction as to avoid unjust or absurd conclusions. *Lau Ow Bew* v. *United States,* 144 U. S., 47, 59; *Hopkins* v. *United States,* 171 U. S., 578; *United States* v. *Joint Traffic Ass'n,* 171 U. S., 550, 567.

The proposition that an officer, agent, or employee of a company operating omnibusses on Sixteenth Street, Washington, should, on grounds of comity and reciprocity, be entitled to interchange of transportation with the Pennsylvania Railroad

Co. simply because the omnibus line is a common carrier, though not subject to the act, would plainly be unjust and discriminatory, and bears upon its face the mark of its unsoundness.

V.

To construe the proviso so as to permit the exchange of passes between a common carrier subject to the act and a common carrier not subject to the act would be doing violence to the very terms of the act itself as expressed in section 1.

That the provisions of the act to regulate commerce with reference to the interchange of passes among common carriers does not include common carriers not subject to the act is apparent from the language of the act itself. Section 1 of the act to regulate commerce states:

> That the provisions of this act shall apply to any * * * common carrier or carriers engaged in the transportation of passengers or property * * * from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States * * *.

Certainly this can not be construed to include a railroad common carrier operating wholly in

Great Britain, neither can it be interpreted to embrace an ocean steamship common carrier operating from a point in the United States to a foreign country which is *not adjacent.* How may it fairly be contended that common carriers of this description operating wholly within a nonadjacent foreign country or from the United States to a nonadjacent foreign country are included in the act in the face of the positive declaration of the act itself—

> that the provisions of this act shall apply to any common carrier engaged in the transportation of persons or property * * * from one State or Territory of the United States to any other State or Territory of the United States * * * or from any place in the United States to an adjacent foreign country.

Under the familiar rule of the expression of the one being the exclusion of the other, it is clear that the act to regulate commerce does not apply to common carriers that are not engaged in the transportaion of passengers or property from one State or Territory of the United States to any other State or Territory of the United States or the District of Columbia or from a point in the United States to an adjacent foreign country. How could the framers of the act have made their purpose plainer than by the definite language they employed to express their intent that the act should not include common carriers not subject to the act?

(*a*) This is emphasized by the amendment inserted to the antipass proviso in 1910, immediately after the proviso in question, which shows that it was the intention of Congress to make the proviso applicable only to carriers subject to the provisions of the act. The proviso reads:

> *And provided further,* That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers subject to the provisions of this act.

The lower court in discussing the meaning of the words "common carrier," and attempting to point out that the words include carriers not subject to the act under section 1 said:

> "That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Here common carriers must refer to common carriers generally, for otherwise telegraph and telephone companies might find themselves hampered in extending their business with concerns entirely unconnected with interstate commerce.

We submit that the proviso in section 1 mentioned by the court has no connection whatever with common carriers *not subject to the act.* Common

carriers not subject to the act were not in contemplation in the enactment of this proviso. The purpose of the proviso was to allow telegraph, telephone, and cable companies, and railroad common carriers *subject to the act* to exchange services.

VI.

The provisions of section 22 permitting the issuance of passes to the employees of other railroad companies are included in the language of section 1, as amended in 1906. The provision of section 22 allowing issuance of passes was modified or repealed by section 1, as amended in 1906.

The pertinent portion of section 22, enacted in 1887, reads as follows:

> Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees.

Railroads are common carriers and are therefore included in that term, and it was the purpose of Congress in enacting the amendment to section 1 to have this amendment take the place of this provision in section 22.

When the amendment of 1906 was before the Senate there was much discussion as to the free-pass provision now a part of section 1 of the act. It was evidently the purpose of Congress to have the free-pass provisions of section 1 repeal the

like provisions in section 22. In the course of the discussion Senator Spooner said (40 Congressional Record, 7921):

> The report made by the committee of conference repeals, of course, the existing law, which has been in force ever since 1895, against which I have heard no complaint that it has been subject to abuse.
>
> * * * * *
>
> Mr. TILLMAN. I do not know that I would be disclosing any secrets of the conference to say that we either had to take this or nothing.
>
> * * * * *

Continuing, Mr. Tillman said:

> The proposition was that we should take this or strike out others, but I am unwilling to leave the old law stand, because it has no punitive clause in it. It is a kind of a loose thing that has a pretense of prohibiting free passes and has not accomplished anything. By putting this drastic provision in, or by consenting to it, the Senate conferees merely deferred action until such time as we could consider this matter calmly and sanely and provide an effective antipass law. That is all.

Again Senator Tillman made clear the purpose of the provisions of section 1 to repeal the free-pass portions of section 22. Mr. Tillman said (Congressional Record, 7925):

> We put the free-pass amendments in the two sections of the bill, or the two para-

graphs of the bill together, and dealt with the whole free-pass subject in the manner we did.

In the proviso of section 1, Congress, to an extent, extended the pass privilege by making the families of employees eligible to receive passes, thereby revising section 22; and since there is nothing said in the provisions of section 22, with respect to "exchanging passes or tickets with other railroad companies for their officers and employees" which is not included in the proviso of section 1, it is clear that the latter enactment to this degree repealed the former. In *Tracey* v. *Tuffly* (134 U. S., 206) the court said:

> And while it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern. (*United States* v. *Tynen,* 11 Wall., 88, 95; *Cook County National Bank* v. *United States,* 107 U. S., 445, 451.)

In *United States* v. *Hermanos y Compania* (209 U. S., 337, 339) the court held:

> We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson* v. *Downing,* 127 U. S., 607;

> *United States* v. *Healey,* 160 U. S., 136. And we have decided that the reenactment by Congress without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States* v. *Falk,* 204 U. S., 143, 152.

In *United States* v. *Tynen* (11 Wall., 88, 92) this principle was enunciated:

> When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

In *Murdock* v. *City of Memphis* (20 Wall., 590, 617) it was held:

> A careful comparison of these two sections * * * can leave no doubt that it was the intention of Congress to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting

what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.

VII.

Even if the provisions in section 22 were not repealed, the expression contained therein that passes may be issued to employees of other railroads includes only employees of the railroad companies subject to the act to regulate commerce.

Railroads mentioned in the act to regulate commerce should be construed to mean railroads subject to the act, for precisely the same reason that carriers should be construed carriers subject to the act. A distinction that would give passes to English railroads, because section 22 used the word railroad, and deny them to ocean carriers between New York and foreign countries would be manifestly unsound. The reasons of public policy apply in both cases. Unless the words " other railroad companies " be held to mean railroad companies subject to the act, they would sanction the issuance of passes not only to employees of every railroad in the world, but also to the employees of local trolley lines, and to every kind and character of rail common carrier. The result would be an increased burden upon those who have to pay for transportation. The Commission's rulings cited in the discussion of section 1 apply to section 22, especially Conference Ruling 95–g. See also Conference Ruling 118, where the Commission held—

That the reduced-rate transportation for municipal governments permitted under section 22 of the act does not apply to municipal governments in foreign countries adjacent.

The plain statement in the first section of the act that it was the intention of Congress to have it apply only to interstate carriers under the jurisdiction of the Commission governs in the consideration of section 22 also. In the proviso the word railroads is used to denote the giver of the pass, though, of course, railroads subject to the act is meant. The anti-pass policy of the United States is crystallized into section 1 of the act to regulate commerce. That part of section 22, relating to the exchange of passes, whatever its original purpose, must now be regarded like the proviso in section 1, as a mere exception carved out of the general prohibition, and should be, like the first proviso, strictly construed.

VIII.

The Erie Railroad Co. is a common carrier subject to the act and bound by it, and the court may issue an injunction broad enough to cover any future issuance of interstate passes to the agents or employees of common carriers not subject to the jurisdiction of the Interstate Commerce Commission under the act to regulate commerce.

In the case of *American Express Co.* v. *United States* (212 U. S., 522), the Supreme Court, through Mr. Justice Day, said:

> An injunction was issued restraining the express companies from "issuing any frank

> or other document " for the free transportation of property to the following persons, to wit, the officers, agents, attorneys, and employees of said defendant and their respective families; the officers and employees of other express companies and their respective families; the officers and employees of any railroad or any other common carrier subject to the act to regulate commerce and its amendments, and their respective families; or to any of said persons; and from transporting and forwarding for said persons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said interstate commerce act and its amendments.

An injunction along similar lines was granted in *Bitterman* v. *Louisville & Nashville R. R.* (207 U. S., 205), to restrain a ticket speculator from selling nontransferable reduced-rate excursion tickets. The court said:

> Certain is it that every injunction in the nature of things contemplates the enforcement as against the party enjoined of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. (See *Slater* v. *Gunn,* 170 Massachusetts, 509, and cases cited.) It may not be doubted that the authority of a court would extend, not only to restraining a particular imminent trespass, but also to prohibiting like acts for

all future time. The power exerted by the court below which is complained of was in no wise different. The bill averred the custom of the complainant at frequently occurring periods to issue reduced rate nontransferable tickets for fairs, conventions, etc., charged a course of illegal dealing in such nontransferable tickets by the defendants, and sought to protect its right to issue such tickets by preventing unlawful dealings in them. The defendants in effect not only admitted the unlawful course of dealing as to particular tickets then outstanding, but expressly avowed that they possessed the right, and that it was their intention to carry on the business as to all future issues of a similar character of tickets. The action of the Circuit Court of Appeals, therefore, in causing the injunction to apply not only to the illegal dealing as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful.

IX.

THE CONTENTION OF THE DEFENDANT WOULD PRACTICALLY NULLIFY THE ANTI-PASS SECTION THROUGH ENLARGING BY MANY THOUSANDS THE NUMBER OF THOSE ENTITLED TO RECEIVE THESE BOUNTIES AT THE EXPENSE OF THE PUBLIC. "MUTUAL BACK SCRATCHING" WITH RAILROAD PASSES,

UNLESS AUTHORIZED BY LAW, CAN NO MORE BE LAWFUL THAN "MUTUAL BACK SCRATCHING" WITH ANY OTHER PUBLIC TAXES.

The Interstate Commerce Commission in two recent reports has pointed out the evil that the anti-pass amendment of 1906 to section 1 of the act to regulate commerce was intended to remedy. In its report to Congress in the matter of the financial relation of the Louisville & Nashville Railroad and other carriers (31 I. C. C., 261) it was shown that the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway had issued in the period of one year, principally to public officials, passes valued at $340,260.61, involving over 11,700,000 miles of intrastate travel. In this report the Commission, discussing this evil, said (p. 264):

> There is scarcely a walk of life which is not represented in this procession of recipients of passes, from the Federal bench to the local politician and the sheriff who summons the jury. The threads represented by these passes tie thousands of citizens to the carriers through improper relations. The lack of morality reflected by the facts here compiled is a menace to the institutions of a free people. These citizens who sell their influence quite as much as though they accepted money bribes seem to be as willing to be tied as the carriers are ready to tie them. Men pledge their influence quietly in the home or school or club, in the professions, in business, in city

> councils, in administrative boards, in courts of justice, in legislative halls, and at the polls.

Thus the evil is alarmingly baneful even under the restrictions of section 1 of the act as construed by the decisions of the Interstate Commerce Commission. How much worse it would be if the apparently limited exceptions carved out of the prohibitions of section 1 were magnified by construction to include a multitude of carriers not subject to the act, with their employees, officers, and agents! There are countless multitudes who, through some connection with a drayage company, omnibus company, tap line, or other carrier, could be considered under such construction as entitled to receive free transportation. If sections 1 and 22 may justly be construed in this way, it would almost be simpler to have the law specify those who must pay for transportation, and let all others ride free, than to ostensibly prohibit the giving of free passes and then make exceptions so broad. Railroads are public highways. What they charge for carriage of passengers and freight is in the nature of a tax on the public. In the absence of legislative authority they should have no more right to carry anyone free than a tax collector should have to remit the amount due from one who should be a taxpayer. It is just as unfair to permit a railroad to carry a part of the public free, while it charges the rest of the public enough to make up for the deadheads, as it would be for a tax assessor to

release a portion of the public from tax paying and to distribute what these should pay among those who do pay, thus compelling the latter to bear the entire burden.

The railroad pass has been one of the most corrupting influences in American public life. Through it in times past agencies of public authority have been corrupted and agencies of public opinion polluted. Its sinister influence has been felt in every department of government. It has been used to manipulate political conventions, to dictate nominations, and to sway elections, all in order that the few might reap where the many sow. A few years ago many legislators, even in States where the act carried with it a heavy penalty, made no secret of accepting free passes from railroads. They had no more moral right to do this, for legislative favors past or prospective, than to accept the equivalent in money. Yet they seemed unconscious of any wrong. In the evolution of public opinion brought about by a realization of the pernicious effects of the pass system these legislators have been touched with a live coal from the altar of the public conscience. No longer will officials publicly admit, as in days gone by, that they are recipients of such favors. As a result of this awakening to the wrongs that flow from the giving of passes by railroads, the anti-pass provision of section 1 of the act to regulate commerce was placed upon the statute books to

prohibit that practice. The railroad pass had become an engine of discrimination—a favorite method of buying traffic—producing favoritism and indirect rebating, thereby burdening the transportation-paying public to such an extent that it was estimated by Chairman Knapp of the Interstate Commerce Commission that from 20 to 25 per cent of all passenger traffic of the country was carried on free passes. Chairman Knapp stated (40 Cong. Rec., 2097):

> If we could eliminate the free transportation and bring this public service down to the impartial conditions where every person who uses it pays his proper share, I believe the passenger rates throughout the country could be materially reduced and still the railroads have better returns from that branch of their service than they have at the present time * * *.

The amendment of 1906—now part of section 1 of the act to regulate commerce—was enacted to cure the scandalous evils born of the issuance of free passes. Under the interpretation given by the Interstate Commerce Commission, a carrier may give comparatively few passes; that is, if the interchange of passes is only permitted among carriers subject to the act the number of the privileged recipients will be very small compared with the result of the opening of the pass floodgates by a judicial determination that passes may be interchanged with all common carriers everywhere.

whether subject to the act or not. The defendant's contention would practically nullify these salutary provisions of section 1, and fan into flame a wrong that was smothered to a large degree compared to what it was before the enactment of the amendment of 1906. It is respectfully submitted that the interpretation of the Interstate Commerce Commission is in accord with the spirit and purpose of the act of Congress in the effort to remedy the pass evil. The contention of the defendant would largely vitiate the anti-pass section and increase by many thousands the number of those entitled to receive these pass bounties at the expense of the transportation-paying public. Even under the interpretation given by the Interstate Commerce Commission, the exceptions to the prohibitions of section 1, strictly construed, permit the giving of passes to such an extent as to lead to the conclusion that there should be a further restriction rather than an enlargement of this privilege at the expense of the public. If the Commission's construction of the law be overruled, it would be difficult to estimate the extent of the abuses that would follow.

The lower court, in its opinion, defended the theory of interchanging passes with all kinds of carriers, whether subject to the act or not, with the suggestion that "mutual back scratching" is not sinful. The same logic could be used to justify bribery—the giving to an official a gratuity in ex-

change for some official act. "Mutual back scratching" between private individuals might not be "sinful," but "mutual back scratching" at the expense of the public is quite another matter. Bribery is not between private individuals. Whatever moral turpitude there may be in one private individual making a present to another private individual in order to secure his influence, that is a matter with which the law is not concerned; but when an official is corrupted, then the law steps in, because the law seeks to hold all official acts free from debauchery. So "mutual back scratching" might not be subject to condemnation if only the giver and taker of passes were involved, but the public is vitally interested in this "mutual back scratching," for when a carrier gives a pass it is furnishing transportation that does not belong to it, but is merely held in trust for the public, and is imposing an additional burden upon the public. We, therefore, say that "mutual back scratching" is reprehensible where it is at the expense of others. When officials of the carrier donate public taxes in order to secure favors they violate the trust relations to the public which they occupy. Without authority of law they have no more lawful right to indulge in "mutual back scratching" with railroad passes than a public official would have to place his hands in the public treasury and take therefrom money to be used in "mutual back scratching."

CONCLUSION.

We therefore respectfully submit that the court below was in error in refusing to enjoin the Erie Railroad Company from issuing interstate free passes to the employees of the trans-Atlantic steamship lines or to the employees of the Great Eastern Railway of England, or to the employees of any other railroad or any other carrier not subject to the act to regulate commerce.

JOSEPH W. FOLK,
Counsel for the Interstate Commerce Commission.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

Nos. 493 and 494.

THE UNITED STATES, APPELLANT,

v.

ERIE RAILROAD COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE UNITED STATES.

We desire to reply briefly upon three points.

I.

Apparently the principal contention of defendants comes to this—that the words "common carriers" and "railroad companies," being words of plain meaning, must be given that meaning in the exceptions to the Anti-Pass Provision, and can not be construed to mean common carriers and railroad companies subject to the Act to Regulate Commerce without violating the rule that where the text of a statute is unambiguous the courts may not read words in or out under the guise of construction. (Point 1, Def't's Br., pp. 17 et seq.)

No one, of course, disputes that rule. It does not mean, however, that words which have a certain meaning when considered apart from any application to a particular object, that is, when considered in the *abstract*, must be given that same meaning when considered not apart from but in connection with a particular object and in association with other words.

In *Atkins* v. *The Disintegrating Co.*, 18 Wall., 272, where the question was whether suits in admiralty were included in the words "all suits of a civil nature at common law or in equity," as used in section 11 of the Judiciary Act of 1789, this court said (pp. 301–302):

> It may be admitted that an admiralty case is a civil suit in the general sense of that phrase. But that is not the question before us. It is whether that is the meaning of the phrase *as used in this section.*
>
> * * * * *
>
> The general language found in one place, may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment. [Italics ours.]

Again, very recently, in *United States* v. *Chavez*, 228 U. S., 525, speaking through the Chief Justice, this Court said (p. 530):

> But the question which we are called upon to solve, that is, the meaning of the words "to export" as used in the joint resolution, may not be disposed of by any mere *abstract*

> consideration of the meaning of the words, but their signification must be determined with reference to the text of the resolution itself. [Italics ours.]

The fallacy of defendant's contention thus lies in its assuming that because, *abstractly* considered, the words "common carriers" and "railroad companies" are unambiguous, therefore they must also be unambiguous when used in the exceptions to the Anti-Pass Provision in association with other words and with reference to a particular object.

Later on in its argument defendant itself, abandoning this assumption, contends that the words "railroad companies" in one of the exceptions (section 22) include trans-Atlantic steamship companies (Point 2, Def't's Br., pp. 41, 44–46)!

II.

The third point in the Government's brief is as follows:

> The construction of a statute by the administrative body charged with its enforcement is always entitled to great weight, and when, as here, Congress has reenacted the statute without altering the part construed, the administrative construction, unless plainly erroneous, must be taken as impliedly ratified by Congress, and therefore as binding upon the courts.

Defendant contends that this principle has no application to the present case because (1) the

Commission's ruling construing the exceptions to the Anti-Pass Provision was *ex parte*, and because (2) its ruling was not accepted by some of the parties affected. (Point 5, Def't's Br., pp. 64 et seq.)

1. The Commission's construction of the disputed exception was made in the *Parmelee Company's Case* (12 I. C. C., 39, 44). Its ruling was not *ex parte*. The Parmelee Company, claiming to be a common carrier, applied to the Commission for permission to interchange passes with the various railroad companies entering Chicago, with all of which it had relations. There was a fuller hearing than is usually the case in administrative proceedings, and the view adverse to that adopted by the Commission was fully presented. Any of the railroads directly interested in the Parmelee Company's application—indeed, under the Commission's liberal practice any railroad, including this defendant, having an interest in the question—would have been gladly heard.

It is true, of course, that many persons and corporations having an interest in this ruling were not heard by the Commission. That is true of most administrative proceedings and of most judicial proceedings as well. But where any single party against whom the ruling was made had every opportunity to present his case the proceeding can not be characterized as *ex parte*. The Commission's ruling in the *Parmelee Company's Case* was no more *ex parte* because of the absence of the Erie

Railroad Company than the proceedings in the present case are *ex parte* because of the absence of the Great Eastern Railway of England and the Trans-Atlantic Steamship Lines.

2. Defendant seems to take the position that despite the frequent statements by this and other courts that great weight is to be attached to the administrative construction of the act to regulate commerce by the Interstate Commerce Commission, nevertheless no weight can be given its ruling in the present case because the Erie Railroad Company and perhaps some other carriers similarly situated have disobeyed the ruling. If that position were correct it would follow that whether an administrative construction is to be given weight by the courts depends upon whether it has been obeyed by the very persons and corporations to control whose action the administrative body was established.

We submit that the true basis of the rule according weight to an administrative construction of a statute is not acquiescence in the construction by the parties affected but the respect due the administrative authority—the respect commanded by experts "appointed by law and informed by experience." (*I. C. C.* v. *Union Pacific R. Co.*, 222 U. S., 541, 547.) As said by this Court in *United States* v. *Moore*, 95 U. S., 760, 763:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful

> consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby,* 12 Wheat., 210; *United States* v. *The State Bank of North Carolina,* 6 Pet., 29; *United States* v. *MacDaniel,* 7 id., 1. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

Similarly in *Bates and Guild Co.* v. *Payne,* 194 U. S., 106, 109, in passing upon a ruling of the Postmaster General as to what is second-class mail matter, this court said:

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, *or of law alone,* his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power and will occasionally exercise the right of so doing. [Italics ours.]

See also the cases cited under the Third Point of the Government's main brief.

The rule is particularly applicable where the administrative body in question, like the Interstate Commerce Commission, has received express authority to enforce the law by orders, regulations,

and rulings. Thus, in *Jacobs* v. *Prichard*, 223 U. S., 200, 214, this court said:

> The rule which gives strength to the construction of the officers who are directed to execute the law and who, it has been said, may have written or suggested it, is given an added force from one of the provisions of the act of Congress. It directs the Secretary of the Interior "to make the necessary regulations to carry out the purposes" of its enactment.

In the *New Haven Case* the same consideration was stated as follows with specific reference to the Interstate Commerce Commission (200 U. S., 361, 402):

> Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the courts that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with.

Another reason for attaching weight to the administrative construction of a statute lies in the necessity, for the proper administration of government, that courts should cooperate with and support executive officers in the performance of their

duties by according proper respect to their opinions upon the matters with which they are charged. If railroads should obtain the impression that the courts would *not* respect the rulings of the Interstate Commerce Commission, they would never obey them unless it was for their interest to do so. They would force the Commission into litigation over every ruling. Such a condition of affairs would seriously impair the authority of the Commission and the effectiveness of our whole system of railroad regulation. Far from adopting such an attitude, the courts, as shown by the cases cited *supra,* have reiterated again and again their willingness to support effectively the Commission's authority.

But if it were necessary to show that the administrative construction has been acquiesced in by the parties affected, the present case could meet that requirement. For, in legal contemplation, the test of acquiescence in an administrative ruling is not whether the ruling has been obeyed or disobeyed, but whether the parties affected by the ruling have made any effort to have it reviewed either by judicial or legislative action. No such effort has been made by the railroads in respect of the Commission's ruling here in question. No application has been made to the courts to enjoin the ruling; and no application has been made to Congress to alter the language of the provision construed by the Commission, notwithstanding that the very section of the law containing that provision was subse-

quently before Congress for amendment and reenactment.

Defendant's statement (Br. p. 68) that it was without power to present the matter to a court for judicial determination is not well founded. It might have filed a suit in equity to enjoin the enforcement of the Commission's rulings (which are merely general orders addressed to all carriers instead of specific orders addressed to particular carriers), just as suit was filed by a carrier to enjoin the enforcement of the Commission's general orders prescribing accounting rules. (*Kansas City Southern Railway Company* v. *United States,* 231 U. S. 423.) Or it might have applied to the Commission to take its own particular case under consideration under the broad powers of section 13 of the Act to Regulate Commerce and make a specific order against it (*Industrial Railways Case,* 29 I. C. C. 212, 218–220), and then have applied to the court to enjoin that order.

We repeat, therefore, that whilst it is not necessary to show that the Erie Railroad Company acquiesced in the Commission's construction, that company is in no position to say that it has not done so.

III.

Under point 5 of defendant's brief (pp. 64–65) the Commission's Conference Ruling No. 95 (g) of June 30, 1908, is criticized upon the ground that it makes the test of eligibility to receive passes,

not whether the carrier is in fact subject to the act, but whether it has so acknowledged itself. An examination of the other sections of Conference Ruling No. 95 shows that this criticism is groundless. Section (a) of the same conference ruling says:

> Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:
>
> 1. * * *
>
> 4. *Officers or employees of carriers not subject to the act to regulate commerce, including officers and agents of steamship and stage lines not subject thereto.* (See Rulin 196; also 95–c.) [Italics ours.]

Under point 5 of defendant's brief it is also said—

> that for over 20 years after the enactment of section 22, providing that nothing in the act should be construed to prevent the exchange of passes with "other railroad com-

> panies," the carriers continued their pre-existing practice of making such exchange with companies *not* subject to the act, without any step being taken by the Commission, even through an *ex parte,* administrative ruling, to make or enforce a different construction of the provision—although the Commission was charged all those years with the duty of enforcing the provisions of the act (p. 69).

This might give a wrong impression. It has already been explained in the Government's main brief that there was no specific prohibition in the Act to Regulate Commerce against the issuance of passes until the passage of the amendment of June 29, 1906, and that before that time the law on the subject was in a state of uncertainty (pp. 7, 30).

G. CARROLL TODD,
Assistant to the Attorney General.
THURLOW M. GORDON,
Special Assistant to the Attorney General.

JANUARY, 1915.

○

FILED
JAN 5 1915
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

October Term, 1914.

THE UNITED STATES,

Appellant,

vs.

ERIE RAILROAD COMPANY,

Appellee.

Appeals from the District Court of the United States for the Southern District of New York.

BRIEF FOR ERIE RAILROAD COMPANY.

GEO. F. BROWNELL,
M. B. PIERCE,
Solicitors for Appellee.

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To be argued by
GEO. F. BROWNELL
for the Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, Appellant, *vs.* ERIE RAILROAD COMPANY, Appellee.	In Equity No. 493
THE UNITED STATES, Appellant, *vs.* ERIE RAILROAD COMPANY, Appellee.	In Equity No. 494

BRIEF FOR ERIE RAILROAD COMPANY.

(References are to the folios of the Records in Cases 493 and 494, respectively.)

Statement of the Case.

These are appeals from the decree and order of the United States District Court for the Southern District

of New York entered April 22, 1914, dismissing the Government's bills of complaint (No. 493-37; No. 494-34). In that court the cases were argued and submitted together, and the same decree was entered in each.

These proceedings were brought by the United States Attorney for the Southern District of New York, on behalf of the United States, at the direction of the Attorney General, under the provisions of Section 3 of the "Act to Further Regulate Commerce with Foreign Nations, and among the States," approved February 19th, 1903, to restrain the appellee, Erie Railroad Company, from continuing alleged violations of Sections 1, 2, 3 and 6 of the Act to Regulate Commerce.

The Government originally instituted proceedings in the Commerce Court to determine the question of the right of the appellee to interchange the passes which are involved in these proceedings. In that Court the cases were submitted on petition and answer, and briefs were filed and oral argument had February 28th, 1913. At that time the Commerce Court consisted of four members, namely, Knapp, P. J., Hunt, Carland, and Mack, J. J. Shortly before its dissolution that Court dismissed the Government's bills of complaint and handed down the following memorandum in each:

> "The above case having been submitted on final hearing upon petition and answer, and after due deliberation the Court as now constituted being equally divided in opinion as to the proper decision thereof,
>
> *Ordered* that the same be, and is hereby dismissed without prejudice."

The present cases were thereupon instituted in the

United States District Court for the Southern District of New York and submitted upon bills and answers substantially similar to those in the cases in the Commerce Court. There was no dispute as to the facts, it having been stipulated and agreed that the facts are as alleged in the respective bills of complaint, except as denied or qualified in the answers, and as alleged and set out in the respective answers, and the cases were submitted to and decided by the District Court upon the bills and the answers thereto,—the allegations of fact made in said answers being formally stipulated as facts in the case (No. 493-27; No. 494-24).

The Issue.

The question at issue is: Should this appellee be enjoined from issuing in customary interchange with the Great Eastern Railway of England, a common carrier, a pass in favor of its employee, H. J. Ketcham, American Agent, and from issuing in such interchange with the Standard Trans-Atlantic Steamship Companies, common carriers, passes for their officers, agents, and employees, in view of the provisions in the anti-pass paragraph of Section 1 of the Act to Regulate Commerce, reading as follows:

> "No common carrier subject to the provisions of this Act shall * * * issue or give any interstate free ticket, free pass or free transportation for passengers, except to its employees and their families, * * * *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employees *of common carriers* and their families;" (Italics ours).

and also in view of the provision in Section 22 of that Act that

> "Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with *other railroad companies* for their officers and employees"; (the italics are ours).

Statement of the Facts.

The Great Eastern Railway of England, while not subject to the Act to Regulate Commerce, is a common carrier at common law, and under the acts of the Parliament of the United Kingdom of Great Britain. Its line of railroad is located in England and it operates a line of boats, known as the British Royal Mail Route, to the Hook of Holland, Holland and Antwerp, Belgium. It also maintains an office in the City and State of New York where part of its business is carried on. It transports freight from points on its line of railroad from the interior of England to the seaboard, and to London particularly, for export to and through the United States, a large part of which freight is transported by this appellee after its arrival in the United States (No. 494-15, 18).

The Erie Railroad Company is interested in this character of freight traffic originating on the line of the Great Eastern Railway of England, and solicits such traffic for routing over its line of railroad and connecting lines to its destination in the United States.

In like manner the Great Eastern Railway of England is interested in freight traffic transported over the rail-

roads of this appellee and other rail carriers in the United States to the eastern seaboard for export, in that it transports such freight destined to points upon its line of railroad.

The rail carriers located in adjacent foreign countries and in European countries carry freight traffic which has been carried on a portion of its transportation by the rail carriers of the United States, and *vice versa*. Consignments of freight are carried in continuous transportation, without intervention of shipper or consignee, from points of shipment in the United States by railroad carriers of this country to the seaboard, thence by ocean carrier to the ports of such adjacent foreign countries and European countries and thence by foreign rail carriers to point of destination, and shipments originating at interior points in such countries are handled in the same way in reverse order. Consignments of freight originating on the Great Eastern Railway of England and on the lines of this respondent are handled in this way (No. 494-18).

Appellee maintains offices for the solicitation of traffic in London, and in Liverpool, England, and employs T. W. Jacobs as its European Traffic Manager. Mr. Jacobs holds an annual pass, good for carriage over the Great Eastern Railway of England and uses said pass in traveling over that railroad in the business of this appellee as well as for his personal use.

Messrs. Thos. Cook & Son are agents of both the appellee and the Great Eastern Railway of England, in selling passenger tickets good for passage over the Great Eastern Railway of England, the intermediate ocean carrier and the Erie Railroad and *vice versa*. They ac-

count to each carrier separately for the transportation so sold by them. The Great Eastern Railway is interested in passenger traffic which passes over the lines of appellee, and appellee has a like interest in passenger traffic which passes over the lines of the Great Eastern Railway.

H. J. Ketcham, American agent of the Great Eastern Railway, travels over the lines of the Erie Railroad for the purpose of soliciting passenger business for the Great Eastern Railway, and routes many passengers, who have traveled over the lines of the Erie Railroad, via the Great Eastern Railway to their destinations in England (No. 494-19).

Appellee issued to said Ketcham an annual pass over its lines, which pass was issued at the request of the Great Eastern Railway on account of said Ketcham's employment as American agent of said Great Eastern Railway, and in pursuance of a practice, which has existed ever since many years before the passage of the Act to Regulate Commerce, of interchanging passes between said Great Eastern Railway and the appellee, and its predecessors in interest, for their respective officers, agents and employees (No. 494-14). Said Ketcham has, by means of said pass so interchanged and issued for him, obtained transportation over appellee's lines, and been transported by it without its exaction from him of the regular rates of fare for passengers specified in tariffs filed pursuant to the provisions of the Act to Regulate Commerce (No. 494-15). Said pass was interchanged with said Great Eastern Railway and issued for Ketcham at the request of a principal officer of the Great Eastern Railway, and in exchange for passes or reduced rate transportation given by the Great Eastern Railway at

the request of a principal officer of appellee, for its officers, agents and employees.

For many years prior to and ever since the passage of the Act to Regulate Commerce, the railroad carriers in the United States in general, including this appellee and its predecessors in interest, have interchanged with other common carriers of passengers and property, including the Great Eastern Railway of England and other railroads of adjacent foreign and European countries, some of which are owned and operated by foreign governments, passes and reduced rate transportation for their respective officers, agents and employees, subject to and in accordance with the rules and regulations of the respective carriers (No. 494-20).

Appellee has from time to time interchanged with various trans-Atlantic steamship companies and other common carriers by water engaged in the transportation of persons and property in foreign or interstate commerce, passes for certain officers, agents and employees of such common carriers. Such passes were issued to and for them at the request of said common carriers by water, respectively, on account of their employment by said carriers, and in pursuance of a practice which has existed ever since many years before the passage of the Act to Regulate Commerce, of interchanging passes between said common carriers by water, respectively, and the appellee and its predecessors in interest, for officers, agents and employees of such common carriers (No. 493-13, 14).

The trans-Atlantic steamship companies referred to in the Government's bill were, at the time of the interchange, issuance, and use of said passes for and by their

officers, agents, and employees, common carriers under the common law and the laws of the States or countries under which they were incorporated. They operate vessels and transport freight and passengers between ports in Great Britain and Europe and New York and other ports of the United States. A large amount of this passenger and freight traffic is transported by this appellee after its arrival in the United States, or in the United States before its departure on the vessels of said trans-Atlantic steamship companies.

Said trans-Atlantic steamship companies transport a large volume of freight traffic which has been, or is to be, transported over a portion of the route between its point of origin and its point of destination by this respondent and its connecting carriers by railroad. Numerous consignments of freight are carried in continuous transportation, without intervention of shipper or consignee, from points of shipment in the United States by this appellee and its connecting carriers by rail to the seaboard and thence by such trans-Atlantic steamship companies to Great Britain and European countries, and shipments originating in Great Britain and such European countries are handled in the same way in reverse order.

This appellee is interested in securing the transportation of traffic so transported by said trans-Atlantic steamship companies and solicits the routing of the same over its line of railroad to and from its destination in the United States. Through export and import bills of lading are, and have been, for many years and ever since long prior to the passage of said Act to Regulate Commerce, issued by agents of this appellee in connec-

tion with other carriers on the route of such traffic, covering the inland or rail transportation of such export or import traffic over the railroads of this appellee and its connecting carriers to or from the port of trans-shipment or port of entry, and also covering the water carriage by the vessels of said trans-Atlantic steamship companies between such port of trans-shipment or entry and ports or places in Great Britain or Europe. In such bills of lading are set forth severally the terms and provisions of the contracts relating to the inland transportation by railroad carrier, or carriers, and the ocean carriage by steamship company, respectively, and such bills of lading are signed by the issuing agent on behalf of such railroad companies and of such steamship companies severally and not jointly. The official classification to which this appellee is a party, duly published and filed with the Interstate Commerce Commission, designated as I. C. C. —O. C. No. 41, under which interstate and export and import shipments over the lines of its railroad are made, contains a copy of the said export bill of lading under which said export shipments are made and carried, and a copy of said export bill of lading is annexed to the Answer, and appears at the end of the Record (No. 493-17, 18).

Agents of said trans-Atlantic steamship companies also issue import bills of lading from European ports covering the ocean carriage to the port of entry in the United States, and also the inland transportation from such port of entry over the railroads of appellee and its connecting carriers to the place of destination. Agents of such trans-Atlantic steamship companies in Europe, in connection with the sale of tickets for ocean passage,

also sell prepaid orders at the lawful published rate and fares of appellee and its connecting carriers, which are accepted by it in exchange for tickets covering transportation over its lines to such points of destination.

Appellee maintains offices for the solicitation of traffic in London, and in Liverpool, England, and employs a European traffic manager, who, acting for the ocean carrier, and the inland carrier by railroad, severally and not jointly, issues import bills of lading covering shipments exported from Great Britain and Europe to interior points in the United States, which bills of lading contain the several terms and provisions relating to the carriage by such ocean carrier and such carriers by railroad, and which are substantially similar to those contained in the form of export bill of lading above mentioned. Said trans-Atlantic steamship companies are interested in securing for their lines the ocean transportation of such foreign freight and passenger traffic so transported over the railroads of this appellee and other carriers by railroad in the United States.

Officers, agents and employees of said steamship companies travel over the lines of appellee for the purpose of soliciting this traffic for their lines, and they secure the routing by their ocean lines of passengers and freight transported over the railroad of this appellee via such ocean lines to said ports of Great Britain and Europe. The freight traffic so transported under such export and import bills of lading is carried in continuous transportation, without intervention of shipper or consignee, from points of shipment in the United States by this respondent and other carriers by railroad to the seaboard and thence by such steamship lines to Great Britain and Euro-

pean countries, and shipments originating in Great Britain and such European countries are handled in the same way in reverse order (No. 493-19, 20).

For many years prior to, and ever since, the passage of the Act to Regulate Commerce the Erie Railroad Company and other railroad carriers of the United States have followed the custom of interchanging passes with trans-Atlantic steamship companies, common carriers by water engaged in the transportation of passengers and property subject to and in accordance with the rules and regulations of the respective carriers issuing such transportation (No. 493-20, 21).

All passes referred to, so interchanged and issued by this appellee and such other railroad companies generally, have always been on the condition that the persons for whom the same were issued and using the same, voluntarily assumed all risk of accidents and agreed that the railroad company should not be liable under any circumstances, whether of negligence of such company or its agents or otherwise, for any injury to the person or property of such users; and the rights and privileges of the persons for whom such passes have been issued, with respect to the transportation afforded them thereunder, have been and are limited in other material respects as compared with the rights and privileges of the passengers for hire transported by this appellee and other railroad companies generally for the regular tariff rates of fare. No distinction has been made or recognized with respect to the right to interchange and issue passes for officers, agents and employees of common carriers engaged in the transportation of persons and property based upon the fact that certain of such common carriers

are common carriers by water, or the fact that certain of such common carriers by water or by railroad, including said Great Eastern Railway of England and said trans-Atlantic steamship companies, have no *situs* in the United States and are engaged in the transportation of persons and property only to and from but not within the United States; although the number and amount of passes and reduced rate transportation so interchanged and issued by this appellee and other railroad companies in the United States for officers, agents and employees of said Great Eastern Railway and such other common carriers by railroad similarly situated and of said trans-Atlantic steamship companies, or issued in such interchange by said Great Eastern Railway or other foreign railroads and said trans-Atlantic steamship companies for officers, agents and employees of this appellee or other railroad companies in the United States, has been and naturally is very limited as compared with the number and amount thereof interchanged between and issued by this appellee and other railroad companies in the United States, for officers, agents and employees of such other railroad companies (No. 493-21, 22; No. 494-20, 21).

Since the passage of the Act to Regulate Commerce no distinction has ever been recognized or made with respect to the right to so interchange and issue passes between railroad companies and other common carriers by railroad or by water, including said Great Eastern Railway and said trans-Atlantic steamship companies, on the basis of the fact that said Great Eastern Railway and said trans-Atlantic steamship companies or other common carriers, either (1), are not subject to the Act to

Regulate Commerce, or (2), have not acknowledged themselves subject to the jurisdiction of the Commission, or (3), have not filed one or more tariffs, joint or local, with the Commission, or (4), have not united with a carrier subject to the Act for the interstate transportation of passengers or property by concurrence in one or more tariffs published and filed with the Interstate Commerce Commission.

Said custom and practice of this appellee, and railroad companies generally, of interchanging with said Great Eastern Railway and other foreign railroads, and with said trans-Atlantic steamship companies, passes and reduced rate transportation for their respective officers, agents and employees to the limited extent above stated, is one which as a matter of common knowledge has existed and been openly followed by this appellee, and other railroads of the United States generally for many years. Its existence was well and commonly known long before the passage of the Act to Regulate Commerce, by the terms of which its continuance was permitted. It rests upon the same considerations, including considerations of business policy, which have always been recognized as justifying the interchange and issuance by and between railroad companies of this country of passes and reduced rate transportation for officers, agents, and employees of other American railroad companies; and Congress by the above mentioned provisos contained in sections 1 and 22 of the Act to Regulate Commerce, as amended, recognized and permitted the continuance of the custom and practice (No. 493-22, 23; No. 494-21, 22).

The bill of complaint in each case alleges a violation by the appellee of sections 1, 2, 3 and 6 of the Act to Regulate Commerce, but on the argument in the District Court

and in the Government's brief in this Court, it was not and it is not seriously contended that the issuing of the passes in question constitutes independent violations of sections 2, 3 and 6 of the Act. The Government now rests its case upon the contention that the so-called anti-pass provision of section 1 of the Act to Regulate Commerce prohibits railroad companies subject to that Act from issuing in interchange with railroad companies and other common carriers *not subject to the Act*, passes for the use of the officers or employees of any such common carrier not subject to the Act.

It is and has been the claim and belief of this appellee and other railroad companies similarly situated that the Great Eastern Railway of England is a common carrier, within the meaning of the proviso in section 1 of the Act to Regulate Commerce which permits the interchange of passes for the officers, agents and employees of *common carriers* and their families; also that it is a railroad company, within the meaning of section 22 of said Act which permits the principal officers of railroad companies to exchange passes or tickets with other *railroad companies* for their officers and employees.

It is and has been the claim and belief of this appellee and of other rail carriers subject to the Act to Regulate Commerce that these trans-Atlantic steamship companies are *common carriers* within the meaning of the proviso of section 1 of the Act to Regulate Commerce, which permits the interchange of passes for the officers, agents and employees of *common carriers* and their families.

Ever since long before the passage of the Act to Regulate Commerce this appellee and other railroad companies of the United States, generally, have consistently, openly

and as a matter of common knowledge followed, and asserted the right to follow, this practice and custom of interchanging passes with common carriers by rail and by water which are not subject to the Act, for the use of their respective employees. The interchange so made, which has been done subject to the rules and regulations of the respective issuing carriers as a matter of managerial detail, they regard and have regarded as beneficial not only to their employees who are the recipients of the passes so received in such interchange, but also as beneficial to the carriers themselves.

THE ARGUMENT.

Outline.

1. The language of the proviso in the anti-pass provision of section 1 of the Act to Regulate Commerce as amended in 1906, is unambiguous, and clearly authorizes the continuance of the long-established and well-known practice and custom, which has existed ever since long before the passage of the Act, of interchanging passes between common carriers subject to the Act and other common carriers for their respective officers and employees.

> To give the construction contended for by the Government the Court would have to interpolate the words "subject to the provisions of this Act" in the provisos of sections 1 and 22 under consideration. This would be legislation and not construction, and is not permissible.

2. The language of the proviso in section 22 of the Act to Regulate Commerce is unambiguous, and clearly

authorizes the continuance of the well-known custom and practice which has existed ever since long before the passage of the Act, of interchanging passes between railroad companies subject to the Act to Regulate Commerce and foreign and other railroad Companies not subject to that Act.

> The provisions of section 22 as construed by the Supreme Court are illustrative rather than exclusive, and under its provisions railroad companies subject to the Act to Regulate Commerce lawfully could and did interchange passes with other common carriers not subject to the Act including trans-Atlantic steamship companies.

3. The legislative history of the anti-pass provision of section 1 of the Act to Regulate Commerce shows no purpose to prohibit the issuing by common carriers subject to the Act of passes to common carriers not subject to the Act, but on the contrary, indicates an intent to permit the continuance of the practice of interchanging passes between common carriers subject to the Act and other common carriers.

4. The history of the long-continued and well-recognized custom and practice of railroad companies to issue passes, in interchange with common carriers by rail and by water other than common carriers subject to the Act to Regulate Commerce, as shown by the established facts in these cases, sustains the construction of the statute contended for by appellee and adopted by the Court below.

5. The Government's contention that the construction given by the Commission to provisions of the Act to

Regulate Commerce in *ex parte* administrative rulings, must be taken as impliedly ratified by Congress and as binding upon the Courts is not supported by either reason or authority.

POINT 1.

The language of the proviso in the anti-pass provision of section 1 of the Act to Regulate Commerce as amended in 1906 is unambiguous, and clearly authorizes the continuance of the long-established and well-known practice and custom which has existed ever since long before the passage of the Act, of interchanging passes between common carriers subject to the Act and other common carriers for their respective officers and employees.

The fundamental rule of statutory construction as stated by Mr. Justice Story in *Gardner* vs. *Collins,* 2 Pet., at p. 93, is that "the spirit of the act must be extracted from the *words* of the act, and not from conjectures *aliunde.*" In *United States* vs. *Fisher,* 109 U. S., 143, that rule of construction was reaffirmed, this Court holding that a legislative act is to be interpreted acording to the intent of the legislature *apparent upon its face;* it was again reaffirmed in United *States* vs. *Goldenberg,* 168 U. S., 95, where this Court held that the primary and general rule of statutory construction is that the *intent* of the lawmaker *is to be found*

in the language he has used; and in the more recent case of *American Express Co.* vs. *United States,* 212 U. S., 522, 535, involving a construction of this anti-pass provision of section 1 of the Act, this Court speaking through Mr. Justice Day, declared:

> "But we are to consider the language which Congress has used in passing a given law, and when the language is plain and explicit our only province is to give effect to the act as plainly expressed in its terms."

The anti-pass provision of section 1 of the Act to Regulate Commerce in part provides that "no common carrier *subject to the provisions of this act* shall * * * issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents * * * *provided,* That this provision shall not be construed to prohibit the *interchange* of passes for the officers, agents and employees of *common carriers.*" That is, this anti-pass provision prohibits common carriers "subject to the provisions of this Act" from issuing interstate free transportation except to the classes named therein, which by the terms of the proviso relative to the *interchange* of passes include "common carriers" *without* the limitation that they must be "subject to the provisions of this Act." (I ics ours.)

This proviso in section 1 merely qualifies and restricts the prohibition contained in the main part of the anti-pass provision. It would seem to have been thought by the commission, as expressed in its *ex parte* ruling In the Matter of the Exchange of Free Transportation, 12 I. C. C., 40, "that a proviso is to be construed strictly, and

that it is not to be understood as adding new matter to the main clause, but rather as modifying its application," and that such a construction would limit its application to common carriers now "subject to the Act." This was an erroneous conclusion.

While it is true that, technically, the office of a proviso is restrictive, yet it is a general practice on the part of legislative bodies to add new matter in a proviso.

See

Georgia Banking Co. vs. *Smith,* 128 U. S., 174, page 181.

I. C. C. vs. *Baird,* 194 U. S., 25, pages 36 and 37.

Chesapeake & Potomac Telephone Co. vs. *Manning,* 186 U. S., 238, page 242.

Baggaley vs. *Pittsburgh & Lake Superior Iron Co.,* 90 Fed. Rep., 638.

As was said by the Supreme Court in *American Express Co.* vs. *United States,* 212 U. S., 522, 534:

> "This Court has had occasion to hold more than once that language used in provisos shows the legislative intention to bring in new matter rather than to limit or explain that which has gone before."

Moreover, it is obvious that whether this proviso relating to the interchange of passes be considered as adding new matter to the main clause or as modifying it by limiting and qualifying its application, the result is the same, namely, it adds to the classes of carriers with which carriers subject to the Act are permitted to interchange passes. Under the Government's contention there would be added only such common carriers as are

"subject to the Act," while under our construction of the provision it, both in terms and effect, excludes from the prohibition of the main clause "other common carriers."

The phrase "common carriers" as used in this proviso is unambiguous; its meaning is clear. "It is to be assumed that words and phrases are used in their ordinary meaning" (*Holy Trinity Church* vs. *United States*, 143 U. S., 457, at p. 463). When language is clear it needs no construction (*Yerke* vs. *United States*, 173 U. S., 439; *Thornley* vs. *United States*, 113 U. S., 310).

> "The language of a statute is its most natural expositor, and where its language is susceptible of a sensible interpretation it is not to be contracted by any extraneous considerations."
>
> *Alexander* vs. *Worthington*, 5 Md., 485.

See, also,

Kohlsaat vs. *Murphy*, 96 U. S., 153.

Neither in the Act itself nor elsewhere has Congress attempted to define the term "common carriers." It has only declared that certain classes of common carriers shall be subject to the Act. It has declared (Sec. 6) that wherever the word "carrier" occurs in the Act it shall be held to mean "common carrier"; but it has not declared that its meaning shall be held to be limited to "common carriers *subject to the Act.*"

The Act does not empower the Interstate Commerce Commission to prescribe the tests of what consttiutes a "common carrier" as that term is used in the Act.

Therefore, the meaning and application of the phrases "common carriers," and "other railroad companies" as

used in the Act must be determined according to the ordinary rules of statutory construction applied by the Courts.

In the absence of legislative definition of these phrases, the words are to be construed in their popular sense (*Maillard* vs. *Lawrence,* 16 Howard, 256).

Ordinary rules of grammatical construction would require that Congress should have inserted before the phrase "common carriers" the modifying adjective "such," or a word of similar purport, if it intended to limit the application of that phrase to the carriers covered by the prohibition contained in the main portion of the paragraph, namely a "common carrier subject to the provisions of this Act."

This rule of grammatical construction was observed by Congress in the enactment of section 4 of the Act which reads in part:

> * * * "it shall be unlawful for any common carrier subject to the provisions of this Act to charge * * * any greater compensation * * * for the transportation of passengers or * * * property * * * *Provided, however,* That upon application *such* common carrier may * * *." (Italics ours.)

The contention of this appellee that the phrase "common carriers" as used in this proviso, means what it says, and is not limited to "common carriers subject to the Act" finds support in the following language of this Court, quoted from the opinion in *American Express Co.* vs. *United States, supra:*

> "While it is true the language here used has reference *to common carriers* and by the terms of

> the Hepburn act express companies are within that description, yet the proviso is as clearly limited to the carriage of passengers and the interchange of passes for officers, agents and employees of *common carriers* and their families, as is the body of the Section itself." (Italics ours.)

In enacting the Act to Regulate Commerce and the various amendments thereto, Congress has been careful to preserve the obvious distinction between the phrases "common carrier subject to the Act" and "common carrier." It recognized that its own authority to regulate commerce does not extend to the regulation of all commerce and of all common carriers engaged in commerce, but only to the regulation of such commerce as is defined in the Constitution and which can be generally described as interstate and international commerce, and of carriers engaged in such commerce. Congress did not extend the jurisdiction of the Interstate Commerce Commission over even all the commerce or all common carriers which Congress under the Constitution has the power to regulate. In enacting the Act to Regulate Commerce, it did not make its provisions applicable to all common carriers, but only to certain specified classes of corporations or persons engaged in certain defined transportation, and the Act was also made applicable to the transportation of property shipped from any place in the United States to a foreign country, or from a foreign country to any place in the United States, although the carriers performing the part of such transportation without the United States would not be subject to the Act. It was also provided that the provisions of

the Act should not apply to intra-state transportation and commerce.

The Act to Regulate Commerce not only imposes many prohibitions, duties and obligations upon the carriers subjected to its provisions, and penalties for violation of or failure to perform the same, and confers rights and privileges on them; but it also provides for the regulation, in various ways, of the relations between carriers so subject to the provisions of the Act and other corporations and persons, including other carriers by rail and carriers by water, whether or not such other carriers are themselves subject to the Act.

Judge Hough in delivering the opinion of the Court below, after a careful examination of the use of these phrases in the various provisions of the Act says:

> "the foregoing examination of the Act satisfies me that no attempt has been made to give to the phrases 'common carrier' and 'common carrier subject to the provisions of this Act' an identical meaning; and all arguments based on such identity fail" (No. 494-31).

From a careful reading of the Act in its original form and as it stands today, one is impressed with the fact that Congress studiously avoided the interchangeable use of the phrases "common carrier" and "common carrier subject to the Act," and that it used these terms advisedly for the purpose of preventing any misconception of its meaning. For example,—although it had described in section 1 of the Act the specific classes of common carriers that were subject thereto, nevertheless, to avoid any misunderstanding of its meaning, it has used

the phrase "common carriers subject to the provisions of this Act" forty-one times.

The use of this restrictive phrase has been omitted on ninety-one other occasions where the Act is intended to refer, and does refer, solely to common carriers subject to the Act, but in each of these instances Congress has manifested that intent by using descriptive words such as "such," "said," "the" and "several," which plainly limit the meaning of the phrase "common carriers" to "common carriers subject to the provisions of this Act" by referring back to the latter phrase as used in the same paragraph or section.

In a number of instances where there could be no question as to the meaning of the language, as, for example, where an express prohibition is laid upon a carrier, or a duty or obligation is imposed, or a right conferred, or a penalty provided, and where Congress would not have the power to make the provisions applicable to common carriers *not subject to the Act*, it has omitted the qualifying words "subject to the provisions of this Act." The qualifying phrase is omitted in fifty-eight instances of this kind but in every such instance its use clearly would have been superfluous.

Also the terms "railroad," "carrier by railroad" or "railroad company" are used in fifteen instances of this kind where it is clear from the context that they refer to such common carriers subject to the Act and where the use of the qualifying phrase clearly would be unnecessary.

It is contended in the Government's brief (Fourth point, pages 18 *et seq.*), that the Commission's construction is in accord "with the sense in which the dis-

puted words are generally used in the statute," and counsel for the Government cites certain instances of the use of the phrases in question as being "typical instances where the qualification is necessarily implied, either from the context or the purpose of the legislation," and from these he draws the conclusion that the phrases "common carriers" and "other railroad companies" as used in the provisos in sections 1 and 22 should be construed as though Congress had interpolated thereafter the modifying words "subject to the provisions of this Act." It will be noted, however, that all of the so-called "typical instances" cited by the Government are instances of the character above mentioned, where the Act imposes an obligation, duty, prohibition or penalty, which could not be applicable to any carrier other than one subject to the Act, and no reason is shown why these phrases as used in the provisos in question should, or even could be given such a limited application. As pointed out in the opinion of the Court below, the terms "common carrier" or "railroad company" are used at some fifteen different places in the Act, including the provisos in question, where they are not limited by modifying words, context or grammatical rules, and are not used in connection with imposing duties, obligations, prohibitions or penalties, which could only be imposed upon carriers "subject to the Act," but where they are used in connection with the regulation of the relations between such last-mentioned carriers and "common carriers" or "other railroad companies" generally, including both those subject to the Act and those not so subject. In all these cases it is to be presumed that Congress meant what it said and did not intend to limit such regulation of inter-

state carriers in these regards merely to their relations with such other common carriers only as are "subject to the Act."

The most striking instances which illustrate the intent of congress to distinguish between "common carriers subject to the Act" and "common carriers" is found where the two phrases appear in contradistinction, of which the following are typical instances:

Section 5 (the anti-pooling provision) provides that:

> "It shall be unlawful for any *common carrier subject to the provisions of this Act* to enter into any contract, agreement, or combination with any *other common carrier or carriers* for the pooling of freights of *different and competing railroads*," (Italics ours.)

It must be clear that the phrases "other common carriers" and "different and competing railroads" cover any and all railroads and other common carriers whether the same be subject to the provisions of the Interstate Commerce Act or not (Opinion of Court below, No. 494-29).

Section 6 provides that:

> "Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with *other common carriers* in relation to any traffic affected by the provisions of this Act to which it may be a party." (Italics ours.)

Section 6 also provides that:

> "Wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'"

If Congress had intended that it should be held to mean "common carrier subject to the Act," it would have said so.

Section 13 "which gives to any 'common carrier' the right to complain of the acts or omissions of 'any common carrier subject to the provisions of this Act' specifically puts the two classes of carriers in contradistinction" (Opinion of Court below, No. 494-30).

In section 5 as amended by the Panama Canal Act of August 24, 1912, it is provided that

> "It shall be unlawful for *any railroad company or other common carrier subject to the Act to Regulate Commerce* to own * * * or have any interest whatsoever * * * in any *common carrier* by water operated through the Panama Canal or elsewhere," etc. (Italics ours.)

The following are additional instances of the use of the phrase "common carrier" and terms of like purport, where they are used in connection with the regulation of the relations between common carriers subject to the Act and "common carriers" in general, and where the context does not indicate that reference is thereby made only to common carriers subject to the Act and where there is no reason for supposing that Congress intended such a limitation:

Third paragraph, section 1, providing that the Act shall not be construed to prevent telegraph companies from entering into contracts with *common carriers* for the exchange of services.

> "Here 'common carriers' must refer to common carriers generally, for otherwise telegraph and telephone companies might find themselves ham-

pered in extending their business with concerns entirely unconnected with interstate commerce." (Opinion of Court below, No. 494-28).

Fifth paragraph, section 1, providing that the term "employees" as used in that paragraph shall include "the remains of a person killed in the employment of *a carrier.*"

Fifth paragraph, section 15, excepting from the prohibition against the giving of information as to traffic by a common carrier subject to the Act, cases where information is given to *another carrier* for the purpose of adjusting traffic accounts;

Last paragraph, section 16, providing that copies of all contracts, etc., between *common carriers* filed with the Commission shall be preserved as public records.

There never has been any contention that Congress intended in the instances cited to refer solely to common carriers subject to the Act, by the use of language used in such cases. In a number of these instances, it would be absurd to suppose that Congress meant to limit the application of the phrase "common carrier" to such carriers only as are subject to the Act.

It appearing from an examination of the Act as a whole that Congress therein referred to both "common carriers subject to the Act" and "common carriers" not subject to the Act, and indicated in each instance by the use of the phrase "subject to the Act" or other suitable phrases or words of limitation and designation, or by the context alone if there could be no question as to the meaning of the language, when it was intended to refer to "common carrier subject to the Act," it is submitted that there is absolutely no reason why it should be con-

ceived that Congress intended any different construction to be placed upon the phrase "common carriers" when used in the proviso in the anti-pass provision, than was intended to be placed upon it in the instances enumerated above. There is certainly nothing in the underlying purpose of the Act or in the legislative history of the anti-pass provision which sanctions such a distinction.

On the contrary, in the amendments to the Act made in 1910, Congress again clearly indicated that it meant to convey exactly what it said by the use of the phrase, "common carriers," in the proviso in question. For in re-enacting section 1, it preserved the identical language of this proviso, but in inserting a new proviso relating to passes or franks issued by telegraph, telephone and cable lines subject to the Act, it limited "the privilege of [such] passes or franks or the exchange thereof" solely to those issued for the employees, etc., of "*such* telegraph, telephone and cable lines," and the employees, etc., of "*other common carriers subject to the provisions of this Act.*" (Italics ours).

It would seem to be clear that if Congress when it so amended and re-enacted section 1, had knowledge of the restrictive *ex parte* administrative construction placed on the original proviso by the Commission, and intended to ratify or adopt the same, it either would have amended the proviso by clearly restricting its application by resorting to some one of the various forms of expression employed by it for such purpose in other provisions of the Act, or it would have omitted—as entirely superfluous, ambiguous and confusing—the qualifying phrase from the proviso relating to telegraph, telephone and

cable passes and franks, which was newly inserted in the section immediately following the original proviso relating to interchange of passes between common carriers by rail and water. However, it did neither of these things, but reaffirmed its previous mandate that the section "shall not be construed to prohibit the interchange of passes for the employees of common carriers" without any such restriction or limitation as is sought to be read into the statute by the Commission; and at the same time it restricted the privilege and exchange of telegraph and telephone franks to the employees, etc., of such lines as are subject to the Act, by the use of the very words of limitation customarily used by it to effectuate such limitation.

There is nothing in the history of the enactment of the amendatory legislation of 1910 which would justify any inference that Congress had any knowledge of, or intended to ratify, or adopt the views expressed by the Commission stating the limitations and qualifications it proposed to apply to the proviso in question.

There are obvious reasons why the distinction should be made and it must be considered that they were apparent to Congress, and that Congress made use of the restrictive phrase in the second proviso, added in 1910, while leaving the phrase "common carriers" unlimited in the first proviso, for good and sufficient reasons. It may be assumed that Congress was aware that there never had existed any custom of interchanging telegraph, telephone and express franks with common carriers not subject to the Act. The situation with respect to the interchange of passes between common carriers by rail and water, and the reasons for such in-

terchange, as presented to Congress in 1906 were entirely different.

Again, as indicating that Congress was aware of the distinction between the meaning to be ascribed to the phrase "common carriers" and the phrase "common carriers subject to the Act," note that Congress by the same amendatory Act of June 18, 1910, to avoid any misunderstanding of its meaning, carefully amended section 15 of the Act by inserting in line 14 thereof the qualifying words "subject to the provisions of the Act," after the words "such carrier or carriers."

The theory of the Commission that Congress did not intend to convey by this phrase "common carriers" as used in the proviso of the anti-pass amendment of 1906, the same meaning as it did by the use of the same phrase in other sections of the Act ascribes to Congress an intent, certainly not justified by any proceedings in that body, by the purpose of the Act, or by its language, to repeal the provision in section 22 of the Act permitting the interchange of passes by railroad companies irrespective of their location, or whether or not they were subject to the Act.

Even if it be held that the Act makes it unlawful for a carrier subject to its prohibitions to exchange passes with classes of quasi-carriers such as transfer companies, carriers by stage, by wagon or by automobile, which are not included the classes of common carriers to which the regulations of the Act apply, it would by no means follow that the Act prohibits common carriers by rail and water to which the Act applies from interchanging passes with common carriers, generally, belonging to the same classes of carriers. Such a construction of the statute

would be much more in harmony with the letter and spirit of the provisions of the Act than would that contended for by the Commission, which would limit the right of interchange to the particular carriers which not only belong to such classes, but which, also, are subject to the Act.

TO GIVE THE CONSTRUCTION CONTENDED FOR BY THE GOVERNMENT THE COURT WOULD HAVE TO INTERPOLATE THE WORDS "SUBJECT TO THE PROVISIONS OF THIS ACT" IN THE PROVISOS OF SECTIONS 1 AND 22 UNDER CONSIDERATION. THIS WOULD BE LEGISLATION AND NOT CONSTRUCTION, AND IS NOT PERMISSIBLE.

The so-called "Pipe Line Cases" in the Commerce Court (*Prairie Oil & Gas Company* vs. *United States, et al.*, 204 Fed. Rep., 798; affirmed in part and reversed in part 234 U. S., 548), and the first "Employers' Liability Cases" (207 U. S., 463) present a somewhat close and interesting analogy to these cases. In the "Pipe Line Cases" *supra*, the question was as to the constitutionality of the amendment of June 29th, 1906, which extended and made the provisions of the Act to Regulate Commerce apply "to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artifical gas, by means of pipe lines or partly by pipe lines and partly by water who shall be considered and held to be common carriers within the meaning and purposes of this Act" * * * The Interstate Commerce Commission ordered the petitioners, the " Pipe Lines" so-called, to file with it schedules of their rates and charges for the transportation of oil in compliance with the provisions of the Act to Regulate

Commerce, whereupon the petitioners applied to the Commerce Court for injunctions *pendente lite*. The Commerce Court stated the law to be that, if the amendment applied literally to all persons and corporations using pipe lines for the interstate transportation of oil, and Congress had thereby undertaken to bring within the scope of the Act persons and corporations owning private pipe lines used solely for transporting their own oil in the conduct of their private business, the amendment was unconstitutional, because it deprived such persons and corporations of their property without due process of law and took their property for public use without just compensation, and the order should be set aside for that reason. Therefore, the court had to determine whether the amendment applied to any corporation, person or persons engaged in the transportation of oil, etc., including the owners of private pipe lines who were not common carriers and who used their pipe lines only for their own private business—the transportation of their own oil only; or only to a corporation or person or persons engaged in such transportation as a common carrier. It was argued that the words "engaged in transportation" meant "engaged in the *business* of transportation," and that the concluding phrase of the amendment, "who shall be considered and held to be common carriers within the meaning and purpose of this Act," limited the preceding declaration respecting the users of pipe lines and operated to confine the amendment to such persons and corporations as were in fact common carriers or might be adjudged to be such by a court of competent jurisdiction.

The court found that the petitioners were not com-

mon carriers, that they carried on a private business, transported only their own oil and had always refused to transport for others.

It held that the amendment applied to and intended to make common carriers of the owners of private pipe lines and was therefore unconstitutional. We quote from the opinion (pp. 805-806):

> "To our apprehension the meaning of this amendment is not open to serious question. It is a clear and comprehensive declaration, in no respect indefinite or incomplete. The concluding phrase is not a limitation or restriction, but on the contrary was plainly inserted for the purpose of fixing the legal status of the persons and corporations included in precise terms in the preceding description, to the end that they should be regarded and treated as common carriers subject to the act by all officials who are or may be charged with the administration and enforcement of the regulating statute. In our judgment the amendment permits of no other or different construction, and we must therefore accept it as a plain and unambiguous measure, designed to effect a complete and definite purpose.
>
> In support of this view we need cite only the first 'Employers' Liability cases' (207 U. S., 463, 500). It seems evident to us that the statute then under consideration was not clearer or plainer than is the amendment in question, nor were its terms any more comprehensive and unqualified. To uphold the constitutionality of that enactment the Government stoutly contended that it should not be construed as applying to all the employees of any common carrier engaged in interstate commerce, although all were included in the language defining its scope, but should be held to embrace

only such employees as were, or when they were, themselves engaged in interstate commerce; and this view is reflected in the dissenting opinion of Mr. Justice Moody. But a majority of the court, speaking through Mr. Justice (now Chief Justice) White, rejected the argument in an opinion from which the following is quoted:

"So far as the face of the statue is concerned, the argument is this: That because the statute says carriers engaged in commerce between the States, etc., therefore the Act should be interpreted as being exclusively applicable to the interstate commerce buisness and none other of such carriers, and that the words 'any employee,' as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce; but this would require us to write into the statute words of limitation and restriction not found in it.

Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional; but this does not imply, if the text of an Act is unambiguous, that it may be rewritten to accomplish that purpose" (Italics ours).

Upon appeal to the Supreme Court it was held that the construction given the statute by the Commerce Court, *supra,* was correct; that the phrase "who shall be considered and held to be common carriers within the meaning and purpose of this Act" did not limit the preceding declaration in the statute so as to confine it to such persons or corporations as were common carriers in a technical sense. Upon this point this Court said:

"The provisions of the Act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words "who shall be

considered and held to be common carriers within the meaning and purpose of this Act" obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the Act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such." (the Pipe Line Cases, 234 U. S., 548, at pp. 559-560).

In the "Employers' Liability Cases," *supra*, the question was whether the words "any employee" in a statute making every common carrier engaged in interstate commerce liable "to any of its employees," should be held to mean *any employee when such employee was engaged only in interstate commerce.* This Court decided that to so hold would be to modify the statute by writing into it after the words "to any of its employees" the words "when engaged in interstate commerce"; and this it declined to do in the language quoted above (207 U. S., pp. 500 and 501).

To give to the parts of the statute under consideration the meaning for which the Government contends, would be to insert therein the words "subject to the provisions of this Act" after the words "common carriers" in section 1 and after "railroad companies" in section 22. We submit that this Court should not write these words into this statute. To so do would be taking the Court out of its province of construction, and trespassing on the province of legislation (36 Cyc., 1127, and cases there cited); would be legislation, not construction.

In the leading case of *Day et al.* vs. *Ogdensburg & Lake Champlain R. R. Co.*, 107 N. Y., 129, it was contended that

the lease agreement by which the Vermont Railroad Co. a corporation organized under the laws of the State of Vermont, leased its road to the Ogdensburg & Lake Champlain Railroad Company, a New York State corporation, was beyond the capacity and power of the latter corporation. The Court of Appeals in answer to this argument, said at page 140:

> "We have seen that the Vermont Railroad Company had corporate powers, and among those expressly given by its charter is a power to lease its road. It had, therefore, contracting capacity, and was a good party to deal with. The Ogdensburg & Lake Champlain Railroad, on its part, lacked no power expressly given by statute to similar corporations in this State, nor any which, as incident and necessary thereto, might enable it to carry on the object of the incorporation. Among other statutes to which it might appeal was one '*authorizing railroad companies to contract with each other*' (Laws of 1839, chap. 218). Under this act it might lawfully agree with *any other railroad corporation* for the use of its road in any manner not 'inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract.' The contract in question is not affected by the limitation expressed in the Act, and *unless we are to imply into it another restriction and say that its operation must be confined to contracts with roads operating in and under the laws of this State, the lease must be held valid between the parties. We see no reason for such restriction, nor any principle of public law which requires it. We are not at liberty to create it. It would be legislation, not construction.*" (Italics ours.)

See, also,

American Express Co. vs. *United States,* 212 U. S., 522.
United States vs. *Goldenberg,* 168 U. S., 95.
United States vs. *Fisher,* 2 Cranch, 358.
Denn vs. *Reid,* 10 Peters, 524.
Sturges vs. *Crowninshield,* 4 Wheaton, 122.
United States vs. *Harris,* 177 U. S., 305.

The Court is not justified in reading into this proviso of the statute a phrase which will have the effect of abrogating a specific provision made therein that common carriers subject to the Act may continue the practice of interchanging passes with other common carriers whether subject to the Act or not (*Hillburn* vs. *St. Paul, etc., Railroad,* 23 Montana, 229).

This Court has declared the Act as a whole to be a remedial statute. While in a sense the anti-pass provision may be said to be remedial, yet clearly it is a penal statute also. A violation of its provisions is a public offense. The liberal construction which may be given this particular provision as a remedial statute does not extend beyond affording all the relief within the Court's power which the language of the Act indicates the Legislature intended to grant, (*Beley* vs. *Naphtaly,* 169 U. S., 353).

The relief which Congress intended to grant is relief from unjust discriminations and undue preferences; but in the Act as a whole the Legislature has shown that it does not regard interchanging passes for officers, agents and employees of common carriers, including common carriers by rail and by water, as an unjust discrimination or undue preference.

In *United States* vs. *Chase*, 135 U. S., 255, the rule was laid down that in construing a penal statute, although the Court is not required to ignore the notorious mischiefs which were intended to be suppressed by the statute, care must be taken not to extend the statute to offenses not included within its language merely because those offenses involved the same mischief which the statute was intended to suppress. The interchange of passes under consideration here, clearly is not an offense within the language of the statute, nor is it included within the mischief which the statute was intended to suppress.

If the words of the provisos in question be taken at their apparent and ordinary meaning, it is not a public offense for a common carrier subject to the Act to interchange passes with a common carrier not subject to the Act. If this Court should declare that the interchanging of the passes in question constitutes a violation of the Act, we submit it would be creating a public offense by supplying words to a penal statute. This would not be a proper exercise of the judicial power.

It is not the function of the courts to add to or take from the clear language as used in any legislative enactment, much less in a penal statute, (*U. S.* vs. *Harris*, 177 U. S., 305). It is the legislature which has the power of punishment, which defines a crime and fixes the punishment therefor, not the judicial department. Therefore, this as a penal statute should not be extended by implication or construction (*Lewis' Sutherland Statutory Construction*, 350 and cases there cited; *Andrews* vs. *United States*, 2 Story, 202).

While the Court must seek and give effect to the mean-

ing of the law makers, its research must not extend beyond legislative language when couched in words that are free from any ambiguity, and it is not within the judicial power to create a public offense by supplying words in a statute (*Ex parte Brown,* 114 N. W., 303). In *Johnson* vs. *Burnham,* 99 Virginia 305, 310, it was said,

> It is safer in a case which admits of doubt, where the Court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which may reasonably be supposed to have influenced the legislature in the particular case should fail of consummation, than that the Courts should too readily yield to a supposed necessity, and exercise a power so delicate, and so easily abused, as that of adding to or taking from the words of a statute."

While this appellee contends that the language of the provisos is clear and unambiguous and shows that the Congress intended to and did authorize the continuance of the previously existing custom and practice of interchanging passes between common carriers subject to the Act and common carriers generally, whether or not subject thereto; yet, even if it should be found that there is room for doubt or conjecture, within the rule just quoted the Court should not insert in the provisos the words "subject to the provisions of this Act" or words of similar purport. In *Ashley* vs. *The State,* 139 Southwestern 872, following *Kohlsaat* vs. *Murphy,* 96 U. S., 160, it was held that the interpolation of words into an Act by construction is allowable only when it is necessary to rescue the enactment from an absuridity, or to carry into effect a purpose obviously plain from the

other parts of the Act. It is submitted that the interpolation of the words "subject to the provisions of this Act," or words of similar purport, after the words "common carriers" and "railroad companies" in the provisos under discussion is not necessary to rescue the Act from an absurdity or to carry into effect a purpose obviously plain from the other parts of the Act.

POINT 2.

The language of the proviso in section 22 of the Act to Regulate Commerce is unambiguous, and clearly authorizes the continuance of the well-known custom and practice which has existed ever since long before the passage of the Act, of interchanging passes between railroad companies subject to the Act to Regulate Commerce and foreign and other railroad companies not subject to that Act.

In enacting the Act to regulate commerce Congress had two main objects:

First: to provide that rates of the railroad companies of this country should not be unjust or unreasonable. Second: to do away with various forms of undue discrimination and preference which existed throughout this country at the time of the enactment of the Act (*Louisville & Nashville R. R. Co.* vs. *Mottley,* 219 U. S., 467; *New York, New Haven & Hartford R. R.* vs. *Interstate Commerce Commission,* 200 U. S., 361). These

objects were particularly provided for in sections 2, 3 and 6 of the Act to regulate commerce.

The effect of the Act to regulate commerce upon the business dealings and policy of the common carriers made subject thereto was so clearly expressed by Judge Jackson, afterwards Mr. Justice Jackson, in *Interstate Commerce Commission* vs. *Baltimore and Ohio R. R. Co.*, 43 Fed. Rep., 37, page 50, that his language has been adopted at least three times by this Court. He said:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

The regulation of carriers subject to the Act was limited to the control of their relations with the general public, *i. e.*, in their functions as common carriers, and they were left free to deal with their employees, and with other carriers where the public interest was not affected, as they had before the passage of the Act. The service which a railroad company performs for the employees of another carrier by railroad or water in carrying them on passes, is not that of a common carrier, for the reason, among others, that it is gratuitous, and the holder of the pass assumes all risk of injury from what-

ever cause. (See *Charleston and Western Carolina Railway Co.* vs. *Thompson*, 234 U. S., 576). The distinction in the character of a railroad company in dealing with the general public, and with the employee of another carrier, as such, is pointed out in *Northern Pacific Railway Company* vs. *Adams*, 192 U. S., 440. It was there said, citing *Baltimore & Ohio S. W. Ry.* vs. *Voight*, 176 U. S., 498:

> "In the light of this decision but one answer can be made to the question. The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would asume the risks of negligence. * * * If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. * * * So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

In enacting the original Act to Regulate Commerce, of February 4, 1887, Congress, in order to insure that nothing in the Act might be construed to prohibit the continuation by the carriers subject to the Act of various existing practices and customs which Congress did not intend to prohibit as being unlawful discriminations, or unlawful preferences, or otherwise in violation of the Act, inserted section 22, whereby it enacted that nothing in the Act

shall prevent the affording of transportation or carriage of persons or property in certain classes of cases free or at reduced rates.

Among other things it was therein enacted that:

> "Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with *other railroad companies* for their officers and employees." (Italics ours.)

This provision is absolutely unrestricted, in so far as it excludes and eliminates from the effect of the other provisions of the Act, the exchange of passes between any railroad company subject to the Act and any other railroad company or companies. We submit that it was deliberately inserted for the purpose of sanctioning the continuance of this well known custom of interchanging passes. The persons designated in this provision as the beneficiaries of such exchange or for whom such passes or tickets might be issued are the officers and employees of the railroad companies making the exchange, but there is no limitation placed upon the railroad companies with whom transportation may be so interchanged.

The provision is unambiguous and expressly authorizes a railroad company engaged in interstate or international transportation—and consequently subject to the Act—to continue the practice of exchanging passes with domestic railroad companies not so engaged and with foreign railroad companies, for the use of their respective officers and employees.

THE PROVISIONS OF SECTION 22 AS CONSTRUED BY THE SUPREME COURT ARE ILLUSTRATIVE RATHER THAN EXCLUSIVE, AND UNDER ITS PROVISIONS RAILROAD COMPANIES SUBJECT TO THE ACT TO REGULATE COMMERCE LAWFULLY COULD AND DID INTERCHANGE PASSES WITH OTHER COMMON CARRIERS NOT SUBJECT TO THE ACT, INCLUDING TRANS-ATLANTIC STEAMSHIP COMPANIES.

It was not the purpose of Congress in enacting this section to indicate that the classes of persons named therein were the only classes in whose favor the railroad company might discriminate without subjecting itself to a violation of sections 2 and 3 of the Act. That has been decided by this Court in the case of *Interstate Commerce Commission* vs. *Baltimore and Ohio R. R.*, 145 U. S., 263, this Court saying at page 278,

> "In other words, this section is rather illustrative than exclusive."

There can be no reasonable distinction made between the officers and employees of a trans-Atlantic steamship company, and the officers and employees of a railroad company subject to the Act to Regulate Commerce, so far as the receipt and use of passes is concerned.. If it is not a matter of unjust discrimination for the Erie Railroad Company to issue a pass to an employee of another railroad company subject to the Act to Regulate Commerce, how can it be said that the issuance by the same railroad company of a pass to the employee of a trans-Atlantic steamship company would result in unjust discrimination in favor of such employee and create for him an unjust preference to the disadvantage of other

passengers who have to pay the regular published rates of fare which are no more than just and reasonable.

It is submitted that the reasons and considerations underlying the interchange of passes between railroad companies subject to the Act for the use of their respective employees, are substantially the same as those which induce the interchange of such transportation between railroad companies subject to the Act and other common carriers not subject to the Act including trans-Atlantic steamship companies, for their respective employees. There is no reason to hold that it was the intent of Congress that the employees of trans-Atlantic steamship companies and other common carriers not subject to the Act should not be permitted to receive transportation from railroad companies.

At the time this section was enacted, the custom with respect to the interchange of passes for the benefit of the carriers' employees was generally known and it was also well known that railroad companies could not expect to obtain passes for their own benefit and for that of their officers and employees from common carriers not subject to the Act unless they granted similar privileges to such carriers for their officers and employees. The public did not demand that any change should be made in this policy, nor was there any argument or debate in Congress to the effect that this practice should be eliminated. The reasons for the enactment of the Act to Regulate Commerce and particularly the clauses therein relating to discrimination did not call for the elimination of any practice of this kind.

POINT 3.

The legislative history of the anti-pass provision of section 1 of the Act to Regulate Commerce shows no purpose to prohibit the issuing by common carriers subject to the Act of passes to common carriers not subject to the Act, but on the contrary, indicates an intent to permit the continuance of the practice of interchanging passes between common carriers subject to the Act and other common carriers.

Statutes are to be construed as they were intended to be understood when they were passed (*County of Schuyler* vs. *Thomas*, 98 U. S., 169). As Mr. Justice Swayne aptly said (*Jones* vs. *Guaranty etc., Company*, 101 U. S., 622), "The intent of the law maker is the law." Should the Court be of the opinion that the portions of the Act here under consideration are not so clear and unambiguous that the intent of the Congress is found in the language of the Act, to ascertain that intent it may properly examine the views expressed by individual members of Congress in debate, and gather therefrom the history of the times, and of the evil which the legislation was intended to remedy (*American Net & Twine Company* vs. *Worthington*, 141 U. S., 468; *Tap Line Cases*, 234 U. S., at p. 27); it may avail itself of all light afforded by the history of the steps taken in the enactment of the law as disclosed by the legislative record (*United States* vs. *Burr*, 159 U. S., p. 85); it may refer to opinions expressed in the reports of committees (*Atlantic Coast Line* vs. *Riverside Mills*, 219 U. S., at pages 200-201).

> "A guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body," (*Holy Trinity Church* vs. *United States*, 143 U. S., 457, at page 463).

What do the debates, the steps taken in the enactment of the statute and the committee reports show? Prior to the enactment of the so-called Hepburn Act of 1906 (34 Statutes at Large, 584) the only restriction upon the issuance of free transportation was whatever was contained in the general language of sections 2, 3 and 6 of the Act to Regulate Commerce. By that Act there was first inserted in the Act to Regulate Commerce a provision prohibiting common carriers subject to the Act from issuing *free passes or transportation for passengers*, except to certain classes designated in that provision and except as otherwise limited and qualified therein, and providing a specific penalty for the issuance and also for the use of such free passes or transportation by any person in violation of such provision.

The House of Representatives passed the bill the first time without including in it or even considering any provision in respect to the issuance of free transportation. In the report of the House Committee on Interstate and Foreign Commerce (Report No. 591, January 27, 1906), submitted by Mr. Hepburn, on pages two and three are stated the evils which the bill sought to remedy —unreasonable rates and favoritism through rebates and other forms of discrimination.

However, when the Senate received the bill it considered a great many amendments proposed for the pur-

pose of limiting in some way the free transportation which had formerly been issued by common carriers subject to the Act to Regulate Commerce. One reason for the Senate's consideration of these various amendments was the feeling that railroad companies should be forbidden to give free transportation to men holding public office on account of the influence which it was supposed that such companies might exercise over those public officials by giving them the benefit of such privilege (see views of Mr. Newlands, page 16 Senate Report No. 1242 to accompany this bill). It was also urged that the wholesale issuance of free transportation should be restricted because of its use by shippers and the consequent discrimination in favor of one shipper as opposed to another; in other words, that by the granting of transportation to the shipping public the railroad companies were to that extent rebating in favor of those shippers who had the benefit of such transportation. The Senate recognized this as being one of the elements going to make up the evils stated in the House Committee's report, *supra*.

Owing to the inability of a majority of its members to agree on a form of bill the Senate Committee on Interstate and Foreign Commerce reported the bill out without amendment. It was considered and amended in the Committee of the Whole of the Senate and printed and reported to the Senate May 16, 1906, with an amendment reading in part:

> "No common carrier engaged in interstate commerce shall hereafter directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers except to its officers, agents and employees and members of their immediate families * * *: provided that this

> provision shall not be construed to prohibit the issuance or interchange of passes for officers, agents and employees and members of their immediate families."

Had this provision become the law it might be argued with much more force that it is unlawful for appellee to issue these passes. In that proposed amendment, only *one* class of carriers was named, *carriers engaged in interstate commerce,* and it might well be that the officers, agents and employees referred to in this proviso were only the officers, agents and employees of those carriers named in the whole anti-pass provision, *i. e.,* carriers engaged in interstate commerce within the Act. It is significant, especially in view of the remarks made during the debate, that the Senate did not adopt that amendment.

After having considered various amendments, some of which only forbade the issuance of free transportation to public officials, and others which prohibited generally the issuance of such transportation except to certain designated classes among which employees of railroad companies were always included, the Senate finally adopted an amendment which provided in part:

> "*No carrier, subject to the provisions of this Act* shall hereafter, directly or indirectly, issue or give any interstate free ticket, free pass or free transportation for passengers, except to its officers, agents, employees, surgeons, physicians, actual and *bona fide* attorneys and members of their immediate families * * * provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and em-

ployees of *carriers* and members of their immediate families." • • •

The House did not concur in the Senate amendment and after consideration, the bill with the amendment was referred to a Conference Committee. The conferees reported to their respective houses a bill forbidding the issuance of *any* free transportation by carriers subject to the provisions of the Act. The Senate, upon considering this bill, refused to adopt a provision which would prevent railroad employees receiving transportation not only from their own companies, but from other common carriers. In the debates upon the conferees' bill it was argued, generally, that the employees of railroad companies had in the past received free transportation from other common carriers, that it was a universal practice against which no complaint had been directed, and that there was no reason why any change should be made in the existing law, in so far as it applied to the employees of railroad companies; (40 Congressional Record, 1906, pages 8154-8157). As the result of this insistence on the part of the Senate that the existing practice with respect to the interchange of transportation between railroad companies subject to the Act and other common carriers, a practice which had existed for years prior to the enactment of the original Act to regulate commerce, should be permitted to continue, the bill was again sent back to the Conference Committee. As the result of the second conference, the following amendment was reported out by the conferees:

"*On and after January 1st, 1907*, any carrier subject to the provisions of this Act shall not directly or indirectly issue any free ticket or pass

> for carriage to any officer or person in the service of the United States other than those in the Postal Service, to any officer or person in the service of any State, Territory, or the District of Columbia, or to any officer or person in the service of any county, township, or municipality and except as herein provided, no common carrier shall be prohibited from granting any free ticket or pass for carriage."

This amendment reported by the conferees after their second conference was acceptable neither to the House, nor to the Senate, because it did not meet the demand that the issuance of free transportation should not be used as a means of rebating or discriminating. Therefore, the bill was again sent back to the Conference Committee, which reported it out in the form in which it was adopted, *i. e.*, in its present form.

The proviso in the present law which reads:

> "Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employees of *common carriers,* and their families;" (Italics ours).

differs from the original amendment, included in the bill when it first passed the Senate, only in so far as it inserts the word "common" before "carriers" and strikes out the word "immediate" before "families."

Considering the anti-pass provision of the Act in the light of the proceedings in Congress, it appears that the legislative body intended that such restrictions be placed upon the issuance of interstate free passes as would prevent their being used for the purpose of obtaining favors from public officials and to create unjust dis-

crimination in favor of certain shippers as against the general shipping and traveling public. In the latter respect, the purpose of Congress in enacting this provision was in line with its object in enacting sections 2, 3 and 6 of the original Act to Regulate Commerce.

It thus appears (*ante, p. 48*), that in the course of effectuating this purpose on the part of the Congress, the Senate considered and rejected a provision which would have permitted the issuance of free passes to substantially those embraced in the present excepted classes, *except* the officers, agents, etc., of common carriers *not subject to the Act,* and approved a provision permitting such issuance of passes to substantially those to whom it is now permitted, *including,* we contend, officers, agents, etc., of *common carriers whether or not subject to the Act;* that this whole anti-pass provision at first was not satisfactory to the House; that the conferees went from one extreme to the other. In the first amendment proposed by them free transportation was prohibited. In the second amendment it was provided that it should be unrestricted except to public officials. Finally the Senate and the House accepted a provision which became the law now under consideration, substantially similar to the provision included in the bill when it first passed the Senate.

Assuming that this provision containing a statutory prohibition against the issuance of interstate free passes with certain exceptions, qualifications and limitations is a declaration that the issuance of free passes to the prohibited classes consitutes an Act of unjust discrimination, the recipient of such free pass being subject to a penalty as well as the carrier who issues the same (*Ameri-*

can Express Co. vs. *United States,* 212 U. S., 522); yet, it clearly appears from the legislative history of this enactment that, in the mind of Congress, no unjust discrimination would be created by permitting common carriers subject to the Act to Regulate Commerce to continue to interchange free transportation with common carriers generally, for their respective officers and employees.

It was clearly the intent of Congress by the insertion of the proviso relative to the interchange of passes in this anti-pass amendment to recognize the long existing and well recognized custom and practice on the part of common carriers subject to the Act to exchange passes for their officers, agents and employees not only with other carriers of like status, but with common carriers generally with whom the practice had been effective. There was neither intent, nor any reason for intent on the part of Congress to limit the interchange of transportation to interchange between common carriers subject to the Act. No suggestion for any such limitation was made by any one either in the debates in Congress or in the Committee reports or on the hearings on the bills before Congress; but on the contrary the discussion indicated a contrary intent. There was no complaint against the existing practice—which had existed prior to and since the enactment of the original Act to regulate commerce.

Such a limitation upon this interchange of transportation would adversely affect rail carriers subject to the Act and their officers, agents and employees.

It might also incidentally adversely affect business interests at our seaports. We may assume that at the time of the enactment of this legislation Con-

gress had in mind the general railroad situation in this country and the situation in Canada. The Canadian railways and our railways are highly competitive. The foreign railroads and trans-Atlantic steamship lines can and do exert a great influence upon the routing of freight and passengers coming into America, and to some extent, going out of America. They can influence, if not determine, at what American port they shall be landed or taken aboard. If our railroads were not permitted to extend to them an interchange of transportation privileges, while our Canadian competitors are free to do so, part of the passengers (immigrants) and freight now landed or taken aboard at New York, or other ports of the United States might be landed or taken aboard at some Canadian port. Instead of the United States railways getting the haul on this traffic the Canadian roads, such as the Canadian Pacific, or the Grand Trunk Railway System in Canada, might get it. So far as transportation wholly outside of the United States is concerned those railroads could not by Congress be prohibited from issuing passes to the officers, agents, etc., of foreign railroads and trans-Atlantic steamship lines. As intimated by the Court below on the argument and in its opinion this situation may have been in the mind of Congress when the provision under consideration was so framed as to permit the continuation of the interchange in question by the rail carriers of the United States.

For the purpose of showing "the situation as it existed, and as it was pressed upon the attention of the legislative body," the view which Congress took of the well known, existing practice of interchanging passes

between common carriers subject to the Act and otherwise, and the object of the proviso in the anti-pass amendment, the remarks of several of the Senators made during the course of the debate on the various anti-pass amendments are quoted:

Senator Beveridge, at page 6935 (40 Cong. Record, 1906), said:

> "Undoubtedly the object to be accomplished is that passes shall be issued to these employees and to also provide for their transportation over *other lines.*" (Italics ours.)

Senator Teller said (40 Cong. Record, p. 6941):

> "I do not know by what authority you propose to say that a railroad company shall not give to an officer of another railroad company free transporation, which has been the custom and usage ever since railroads were built in this country."

Senator Spooner said (40 Cong. Record, p. 7922):

> "There is no reason why the families of railway employees should not be included in the free transportation granted by the carrier which employs them or obtained by an exchange from other carriers. These men all have their vacation time. It is for their pleasure, for their good, and for the good of the public that they should avail themselves of it by travel and rest and recreation. * * * Why should not railroad corporations, common carriers in interstate commerce, be permitted to exchange free transportation with the officers of other companies and their families and the employees of other such carriers and their families? It has always been done. It is in the interest of the public that it should be done; and

why should it be prohibited? Who has complained of the operation of the existing law in that respect?"

In view of the situation as disclosed by the Record (No. 493-23; No. 494-22) as to the custom of interchanging passes, the adoption by Congress of the word "interchange" in this proviso of section 1, after having used a similar term in section 22 of the Act, indicates that it was not its purpose to prohibit the continuance of the custom and practice of the exchanging of passes by railroads subject to the Act with other railroads whether subject to the Act or not. Otherwise there must be ascribed to Congress the purpose of preventing common carriers subject to the Act from obtaining for their officers and employees transportation from common carriers not subject to the Act either for their own use or for the benefit of the receiving carrier. There is nothing in the legislative history of this amendment to support such a view, nor has it ever been contended nor is it now contended, even by the Interstate Commerce Commission, that the officers and employees of common carriers subject to the Act are forbidden from obtaining passes from any common carrier which is willing to grant them the privilege; yet it is well understood that the only basis upon which the employees of common carriers subject to theAct can secure such passes from common carriers not so subject, is upon the reciprocal basis. No common carrier, not subject to the Act to Regulate Commerce, would grant free transportation to a common carrier, subject to that Act, for its employees, except by way of interchange, any more than would one common carrier subject to the Act extend the privilege of free transportation for

the employees of another carrier of the same status, should not that carrier reciprocate.

POINT 4.

The history of the long-continued and well-recognized custom and practice of railroad companies to issue passes, in interchange with common carriers by rail and by water other than common carriers subject to the Act to Regulate Commerce, as shown by the established facts in these cases, sustains the construction of the statute contended for by appellee and adopted by the Court below.

The facts with respect to the practice and custom of interchanging passes in cases like those under consideration are undisputed. See *Statement of the Facts, ante,* pp. 6, 7, 11-13.

For many years prior to, and ever since the passage of the Act to Regulate Commerce, this practice of interchanging passes and reduced rate transportation for their respective officers, agents and employees has been followed by railroad common carriers in the United States in general on the one hand, and other common carriers engaged in the transportation of passengers and property, including trans-Atlantic steamship lines and foreign railroads on the other hand, and no distinction has been made or recognized with respect to the right

to do so, based upon the fact that such other common carriers, including the trans-Atlantic steamship companies and the Great Eastern Railway of England, are not subject to the Act to Regulate Commerce, or have not united with a carrier subject to that Act for the interstate transportation of passengers or property by concurrence in a tariff published and filed with the Interstate Commerce Commission.

Appellee and other companies similarly situated have ever since, and even long before the passage of the Act to regulate commerce, openly followed the existing practice, with the full knowledge of Congress and the public. During all this time Congress has shown no disposition to amend the Act so as to expressly limit the right to interchange passes to such interchange with common carriers "subject to the Act to Regulate Commerce," although the sections of the Act which are in question have been amended from time to time. No complaint or criticism has been made of the existing practice except the administrative, *ex parte,* ruling of the Commission, that the Act does not permit interchange of passes except with carriers that file tariffs or concurrences in tariffs with the Commission. It has not been suggested, even by the Commission, that the interchange of passes with common carriers by railroad or water, not subject to the Commmission—to the extent to which it has been done—has subjected any one to any unjust discrimination or undue preference, or in any way resulted in injury to the public, or to the carriers concerned in the transactions, or to the officers and employees of the appellee, and other common carriers who have been the recipients of transportation so interchanged.

The number and amount of passes and reduced rate transportation so interchanged and issued by this appellee and other railroad companies in the United States for officers, agents and employees of said Great Eastern Railway and such other common carriers by railroad similarly situated and of said trans-Atlantic steamship companies, or issued in such interchange by said Great Eastern Railway or other foreign railroads and said trans-Atlantic steamship companies for officers, agents and employees of this appellee or other railroad companies in the United States, has been and naturally is very limited as compared with the number and amount thereof interchanged between and issued by this appellee and other railroad companies in the United States, for officers, agents and employees of such other railroad companies.

In speaking of the reason for the existence of the custom of according transportation to employees of other common carriers, Mr. Justice CURTIS, in delivering the opinion of this Court in *Steamboat New World* vs. *King* (16 How., 469, p. 473), decided in 1853, said:

> "It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it, and the fair presumption is that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment tends to render that employment more desirable and, of course, to enable the employer more easily and cheaply to obtain men to supply his wants."

The interchange of transportation between common

carriers obtains for their respective employees privileges which make their employment more desirable. The employees of a common carrier not only obtain the privilege of riding *for their personal benefit* upon the lines of other common carriers, by reason of the practice of interchanging passes, but also and more frequently upon the business of the carrier employing them.

It is stated in the Third Annual Report of the Commission, p. 12 in urging that carriers be permitted to furnish free transportation for employees and their families over their own lines, that

> "it is obvious for many forcible reasons, the most amicable relations should exist between the railroad companies and their employees, and that the latter should feel that the companies are disposed in all proper ways to manifest an interest in their general welfare. The compensation of these employees is low, the service exacting and often hazardous, their opportunities to give attention to domestic affairs are very limited, and as a rule they are dependent almost entirely on their compensation for the support of their families."

As strongly urged in Congress by Senator Spooner (see *ante*, p. 56) and others when this measure was under consideration, there is no reason why railroad companies and other common carriers in interstate commerce should not be permitted to continue to exchange free transportation with the officers of other companies for their employees and their families as had always been done. To use the language of Senator Spooner:

> "It is in the interests of the public that it should be done; and why should it be prohibited? Who

has complained of the operation of the existing law in that respect?"

No one either when the provision was under consideration by Congress or since then has complained of this practice or ascribed evil consequences to its operation.

In these respects, there is no distinction between an interchange of passes for the employees of common carriers subject to the Act to Regulate Commerce, and an interchange between such carriers on the one hand and foreign railroad companies, trans-Atlantic steamship companies and railroad companies operating within the confines of a State and not under a common arrangement or control for the through handling of business, which railroad companies were not made subject to the Act to Regulate Commerce (*United States* vs. *Railroad Company*, 81 Fed., 783; *C. N. O. & T. P. R. R.* vs. *I. C. C.*, 162 U. S., 184; *U. S.* vs. *Geddes*, 131 Fed., 452; *I. C. C.* vs. *B. Z. & C. R. R. Co.*, 77 Fed., 942), on the other. It is all a matter of reciprocity.

The custom has existed so long, that the date of its origin is uncertain, but there has been such a custom in effect for many years prior to the passage of the Act to Regulate Commerce, which was approved February 4th, 1887, and became effective April 5th, 1887. The practice of interchanging passes with foreign railroad companies and with trans-Atlantic steamship companies, although probably not contemporaneous in its origin with the practice of making such interchange between railroad carriers of this country, has existed, nevertheless, for many years, and been as well understood (No. 494, *supra;* No. 493, *supra*). This Court ought not to

impute an intent to the Congress, not clearly expressed in the legislative enactment, which is in direct hostility to the traditions and policy in regard to the interchange of these passes which have existed for so many years (*Chamberlain* vs. *Chamberlain*, 43 N. Y., 424), and especially since prohibiting the continuance of this custom of issuance and interchange is not necessary to carry out any purpose of the statute.

> "To so hold requires the reading into the statute of something not found therein and something not essential to the carrying out of the general scheme and plan of the legislation." *Matter of Frontier & Western R. R. Co.*, 155 App. Div., N. Y., at page 62.

We submit that it was in recognition of, and with the intent to permit the continuance of, this long-continued and well-recognized custom and practice of interchanging passes, that Congress refused to incorporate in the law a provision which would have destroyed it, and so framed the statute that its continuance is permitted.

POINT 5.

The Government's contention that the construction given by the Commission to provisions of the Act to Regulate Commerce in ex-parte administrative rulings must be taken as impliedly ratified by Congress and as binding upon the courts, is not supported by either reason or authority.

The fallacy of the Government's contention in this regard is particularly apparent in a case like the present, where the Commission by ex-parte and administrative rulings has construed clear and unambiguous provisions of the statute contrary to the ordinary and usual meaning of its language, and where the Commission's construction has not been adopted or acted upon by the interested carriers, by legislatures or by the Courts, and where the Commission, though charged with the duty of enforcing the provisions of the statute, has taken no steps to enforce or test the correctness of its construction of the statute until the lapse of many years after the making of the administrative rulings in question.

It will be noted that the Commission in its *ex parte* administrative ruling upon the subject—Conference Ruling No. 95 (g) of June 30, 1908—does not declare that the right of a rail or water carrier subject to the Act to issue transportation to another rail or water carrier depends upon whether such latter carrier is or is not subject to the Act; but it declares that it "*will recognize* any rail or water carrier *filing a tariff*, joint or local, *with the Commission*, as a carrier subject to the Act *so*

far as the issuance of passes to its officers and employees may be concerned." And that "where a carrier *has no tariffs on file* with the Commission, *and does not acknowledge itself subject to the Commission's jurisdiction,* the *Commission will regard* the issuance of passes to its officers or employees *as unlawful, without, however, thereby passing upon the question of the jurisdiction of the Act over such carrier* in so far as it may be necessary to assert such jurisdiction." (Italics ours.)

The construction so given to the Act, if sustained, would seem to make the right of a rail or water carrier to issue passes in interchange with any other such carrier depend not upon whether such other carrier is in law or in fact subject to the Act, but upon whether it has filed with the Commission one or more tariffs of any kind, either joint or local, *and acknowledged itself subject to the Commission's jurisdiction.*

It is submitted that Congress did not authorize the Commission to impose any such test as to the right of a carrier to interchange passes with other common carriers; and that there is no warrant in the statute for a construction which would permit such interchange provided a carrier voluntarily or on the requirement of the commission should file one or more tariffs with the commission, but which otherwise would prohibit such interchange.

The rule that the construction of a statute by the administrative body charged with its enforcement is to be followed or is to be given weight by the courts, is only applied where that construction has been followed in practice. It was founded on the feeling that if, at the time a statute went into operation—when its purposes,

etc., were fresh in the minds of those construing it and those affected by it—the body charged with its enforcement gave it a particular construction which was acquiesced in, and adopted in practice by, those affected, that might be considered evidence of its proper meaning. If, by this long continued acquiescence it became a rule of property, naturally it would be given more weight. However, in order for that rule to apply, the practice or usage in conformity to the construction so given the statute must have been public and general.

Wherever, in the decisions of this Court, as well as of other courts, including those expressly relied upon by the Government here, the construction of the administrative body was given weight, that construction had been continuously observed for many years. That such continuous practical execution of the construction was necessary in order to give the rule weight was well recognized in this Court's opinion in *New Haven Railroad* vs. *Interstate Commerce Commission,* 200 U. S., 361—the opinion being written by the Chief Justice—where it is stated:

> "A construction made by the body charged with the enforcement of a statute, *which construction has long obtained in practical execution,* and has been impliedly sanctioned by the re-enactment of the statute, when not plainly erroneous, must be treated as read into the statute." (Italics ours.)

The constructions here referred to were made in regular proceedings before the Commission, at which the carriers were represented. They were put into practical execution, were acquiesced in by the carriers and became rules of property affecting vast interests. Quite differ-

ent is the situation in the instant cases, where it appears that the Commission's theory as to the construction of this proviso was *not* put into practical execution, was not acquiesced in; that no change was made in the well-known practice of common carriers subject to the Act to interchange passes with common carriers not subject to the Act, on account of or after, the Commission made its *ex parte* rulings. This Court has not heretofore felt itself bound to follow rulings of the Interstate Commerce Commission construing the Act, even though such rulings were put into practice. This is well illustrated by the case of *Omaha & Council Bluffs St. Ry. Co.* vs. *Interstate Commerce Commission,* 230 U. S., 324, where this point was pressed upon this Court (see pp. 331-332). In that case it was contended that the Interstate Commerce Commission had since 1897 construed the statute as giving it jurisdiction over the class of street railroads represented by the appellant, and that such construction and assumption of jurisdiction had been generally acquiesced in for 15 years. Yet this Court held that under the statute the "railroads" referred to therein did not include street railroads of the character of the appellant. In *United States et al.* vs. *Baltimore & Ohio Southwestern R. R. Co. et al.,* 226 U. S., 14, the Interstate Commerce Commission, under the construction which it had given the statute, had ordered a switch connection between the appellee railroad companies and the appellant traction Company, under the provisions of the Act to Regulate Commerce requiring common carriers subject to the Act to establish switch connections with lateral branch lines of railroad on certain conditions. This Court attached

no weight to this construction of the Act by the Commission, but determined that the Traction Company was not a lateral branch line of railroad within the meaning of the statute and affirmed the lower Court's decree setting aside the Commission's order. See also *Interstate Commerce Commission* vs. *D. L. & W. R. R. Co.*, 216 U. S., 531, where this Court, instead of following or giving weight to the Commission's construction of the provision of the Act there under consideration, found it altogether wrong and declared the proper construction. It would seem that in that case there was more basis for the Commission's interpretation than there is in the instant cases.

The only way by which the correctness of the construction which the Commission in its rulings, *supra*, had stated it placed upon the statute could be judicially determined, would be by such a suit as we have here or by an indictment. Such a suit or indictment could only be brought by the Government, and reasonably would only be brought at the instigation of the Commission. The carriers subject to the Act could not bring it. They could only let it be a matter of common knowledge that they adopted and pursued in practice a contrary construction, and await a final determination of the question by the Courts at the instigation of the Government. That they did (No. 494-22; No. 493-23). Under those circumstances, as the machinery to obtain a determination of this question by the Courts could be set in motion only by the Government, no weight whatever should be given this construction of the statute by the Commission, which waited six years

after making its administrative ruling before beginning the action necessary to ascertain whether that construction was the lawful and proper one, although as a matter of common knowledge the carriers subject to the Act were ignoring that construction and in practice placing upon the Act a directly contrary construction.

In this connection it should be remembered that for over 20 years after the enactment of section 22, providing that nothing in the Act should be construed to prevent the exchange of passes with "other railroad companies" the carriers continued their pre-existing practice of making such exchange with companies *not* subject to the Act, without any step being taken by the Commission, even through an *ex parte,* administrative ruling, to make or enforce a different construction of the provision—although the Commission was charged all those years with the duty of enforcing the provisions of the Act.

The Commerce Court, after a careful consideration of the questions involved, and on the same facts as are now presented to this Court, declined to accept the contention then and now made by the Government, and dismissed the Government's petitions. While such dismissal was without prejudice (inasmuch as the four judges were evenly divided in opinion) it should be borne in mind that one of the judges was a member of the Commission, and its Chairman, at the time the Commission made the administrative, *ex parte,* ruling, the correctness of which it was the purpose of the proceedings in that court to test. Having failed to obtain from the Commerce Court a decision that the Act does not permit the continuance of the well known practice of interchange, the Government brought the present proceedings asking

an injunction restraining this appellee from continuing the practice. The issues were clearly raised in the Court below, and as appears from its opinion (No. 494-25-33; No. 493-28-36), were carefully considered by that Court, which held that:

> "To sum this matter up, it is plain that the contention of the Government is not to be found in the letter of the statute; nor is it discoverable in the spirit thereof, because there is no evidence of actual intent on the part of the Legislature, because viewing the whole Act the phrase 'common carrier' is not and was not intended to be synonymous with the phrase 'common carrier subject to the provisions of this Act,' and because there is no reason shown why Congress should be thought to have given the privilege of exchanging passes with one kind of common carrier and not with another."

CONCLUSION.

It is respectfully submitted:

That the Great Eastern Railway of England is within the proviso of section 22 of the Act to regulate commerce permitting the exchange of passes or tickets for the officers and employees of railroad companies;

That the appellee, by implication, has the right under section 22 of the Act to Regulate Commerce to interchange with trans-Atlantic steamship lines—which are common carriers, although not subject to that Act—passes for their respective officers and employees;

That the proviso in section 1 of the Act permitting the interchange of passes between common carriers, author-

izes this appellee to interchange passes with the Great Eastern Railway of England—and with the trans-Atlantic steamship companies in question, for its and their respective officers and employees;

That the appeals from the decrees of the Court below should be dismissed.

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